No. ___

IN THE

Supreme Court of the United States

MARSHA SEIBER and ALVIN SEIBER,
Petitioners,

v.

UNITED STATES,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

PETITION FOR A WRIT OF CERTIORARI

PHILLIP D. CHADSEY *
CHARLES F. ADAMS
STOEL RIVES LLP
900 SW Fifth Avenue, Suite 2600
Portland, OR 97204-1268
(503) 294-9376

* Counsel of Record

Counsel for Petitioners

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QUESTIONS PRESENTED

(1) Can Petitioners state a claim for a taking under the Just Compensation Clause of the Fifth Amendment to the U.S. Constitution when state law defines standing timber as a separate and independent property interest and when the refusal of the United States Fish & Wildlife Service to issue an incidental take permit for a spotted owl nesting site denied Petitioners all economically beneficial or productive use of such timber and eviscerated their reasonable investment-backed expectations?

(2) Can Petitioners state a claim for a physical taking of their property in violation of the Just Compensation Clause of the Fifth Amendment to the U.S. Constitution when, in order to protect a spotted owl nesting site, the United States Fish & Wildlife Service denied Petitioners the right to exclude the owls by refusing to issue an incidental take permit that would have authorized Petitioners to log their 40-acre tract of land?

PARTIES TO THE PROCEEDING

The only parties to the proceeding are Petitioners Marsha and Alvin Seiber and Respondent United States.

CORPORATE DISCLOSURE STATEMENT

There are no corporate parties.

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PETITION FOR WRIT OF CERTIORARI

Petitioners Marsha and Alvin Seiber respectfully petition for a writ of certiorari to review a judgment of the United States Court of Appeals for the Federal Circuit affirming the Court of Federal Claims' dismissal with prejudice of Petitioners' takings claims based upon the Fifth Amendment to the U.S. Constitution.

OPINIONS BELOW

The appellate judgment, entered on April 19, 2004, is reproduced as Appendix A ("App. A"). The April 19, 2004 decision of the United States Court of Appeals for the Federal Circuit is reproduced as Appendix B ("App. B"). The September 6, 2002 judgment of the Court of Federal Claims dismissing plaintiffs' claims with prejudice is reproduced as Appendix C ("App. C"). The Court of Federal Claims'

September 4, 2002 opinion dismissing Petitioners' physical and regulatory takings claims is reproduced as Appendix D ("App. D").

STATEMENT OF JURISDICTION

The appellate judgment and opinion of the United States Court of Appeals for the Federal Circuit was entered on April 19, 2004 (*see* Apps. A and B). (*See* App. A.) This Petition is being timely filed within 90 days of that judgment. 28 U.S.C.A. § 2101(c) (West 1994). The Court has jurisdiction pursuant to 28 U.S.C.A. § 1257(a) (West 1993).

CONSTITUTIONAL PROVISIONS INVOLVED

The federal constitutional provision at issue in this case is the Takings or Just Compensation Clause of the Fifth Amendment, which provides: "[N]or shall private property be taken for public use, without just compensation." U.S. Const. amend. V.

STATUTORY AND ADMINISTRATIVE PROVISIONS INVOLVED

The U.S. Fish & Wildlife Service (the "FWS") is authorized to issue an incidental take permit ("ITP") for the "taking" of a threatened species under section 10 of the Endangered Species Act of 1973 (the "ESA"), 16 U.S.C.A. § 1531, *et seq.* (West 2000 & Supp. 2004). *See id.* § 1539 (West 2000). (App. LL.) When the FWS refused to issue an ITP, Petitioners were prohibited from harvesting timber on their property based upon Oregon Administrative Rule 629-665-0210 (2004), formerly numbered 629-024-0809, the pertinent parts of which provide:

> (1) Whenever the State Forester determines that an operation will conflict with protection of a nesting site of the northern spotted owl (Strix occidentalis caurina), the operator must obtain the State Forester's approval of a

written plan before commencing the operation. The written plan, at a minimum, must address how the operation will be conducted to provide for the following:

(a) A 70 acre area of suitable spotted owl habitat encompassing the nest site, to be maintained as suitable spotted owl habitat; [and]

(b) Prevention of disturbances resulting from operation activities which cause owls to flush from the nesting site. . . .

(2) For the purposes of this rule, nesting site means and includes the tree, when known, containing a spotted owl nest; or when not specifically known, includes an activity center of a pair of adult spotted owls. An activity center is a location determined by the State forester to have been reliably identified as being occupied by an adult pair of spotted owls, capable of breeding. . . .

. . . .

(5) Exceptions to the requirements for protecting northern spotted owl nesting sites may be approved by the State Forester if the operator has obtained an incidental take permit from federal authorities under the federal Endangered Species Act.

This rule is reproduced in its entirety as Appendix JJ ("App. JJ").

STATEMENT OF THE CASE

A. Facts Material to the Question Presented.

The ESA, 16 U.S.C.A. §§ 1531-44, prohibits the "take" of an endangered species, *id.* § 1538(a)(1)(B) (West 2000), which includes harassing, harming, pursuing, wounding, or killing such an animal, *id.* § 1532(19) (West 2000). The Environmental Protection Agency ("EPA") defines the ESA prohibition against "harming" endangered species to include "significant habitat modification or degradation where it

actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering." 50 C.F.R. § 17.3 (2003). The ESA also provides a permitting mechanism to allow the "incidental take" of an endangered or threatened species in certain circumstances, authorizing "any taking otherwise prohibited . . . if such taking is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity." 16 U.S.C.A. § 1539(a)(1)(B) (West 2000).

The ESA invests the Secretary of the Department of the Interior with the authority to "determine whether any species is an endangered species or a threatened species." *Id.* § 1533(a)(1) (West 2000). Pursuant to this responsibility, the FWS, a division of the Department of the Interior, listed the northern spotted owl as a threatened species in 1990. Endangered and Threatened Wildlife and Plants; Determination of Threatened Status for the Northern Spotted Owl, 55 Fed. Reg. 26,114 (June 26, 1990). (*See also* Apps. N, O, Q, and R.)

Oregon maintains a system of endangered species protection as well, which coexists and overlaps with the federal system. *See* Or. Rev. Stat. § 496.182(1) (2003). Once the Oregon Department of Forestry ("ODF") has designated a certain area as protected habitat for an endangered species, an individual may engage in otherwise prohibited activity only by securing a federal ITP from the FWS. (App. JJ.) Or. Admin. R. 629-665-0210(5).

The Seibers own a 200-acre parcel of land in Linn County, Oregon, which included merchantable timber. (App. F.) In January 1996, ODF implemented regulations to protect the northern spotted owl in accordance with the FWS's determination of their threatened status. (App. F.) ODF designated a 70-acre area in Linn County, Oregon, as a protected spotted owl nesting habitat, including 40 acres of the Seibers' 200-acre property. (App. F.)

On February 4, 1998, the Seibers submitted a "written plan" to ODF, as required by Oregon law, to log timber on the regulated 40 acres. (App. F.) *See* Or. Rev. Stat. § 527.670 (1994); Or. Admin. R. 629-665-0210(1). ODF rejected the Seibers' logging application on February 19, 1998, explaining that ODF could not make an exception to the protected status of the nesting site unless the Seibers procured a federal permit (an ITP) in accordance with the ESA. (App. F.) (*See also* Apps. GG, HH, and II.)

On November 24, 1999, the Seibers submitted an ITP application to the FWS, seeking a permit to log on their regulated 40 acres. (Apps. M and P.) The Seibers' application included a Habitat Conservation Plan ("HCP"). (Apps. M and P.) Such a plan is required to describe the likely impact of the requested "take," the applicant's plan to "minimize and mitigate such impacts," the alternative options pursued by the applicant, and the reasons those options were not ultimately chosen. 16 U.S.C.A. § 1539(a)(2)(A) (West 2000).

Notice was published in the Federal Register on February 18, 2000, notifying the public of the Seibers' ITP application and requesting written comments on the permit application and HCP by March 20, 2000. (App. X.) (*See also* Apps. K, M, S, T, U, and W.)

After the notice and comment period had run, the FWS formally rejected the Seibers' ITP application on July 6, 2000, on the ground that the application did not satisfy applicable criteria for mitigation. (Apps. J, L, and Y.) The Seibers requested reconsideration of the ITP denial on July 28, 2000. (App. Z.) Reconsideration was denied, and the Seibers appealed to the Regional Director of the FWS on September 26, 2000. (Apps. I and AA.) The Regional Director denied the appeal on November 9, 2000, explaining that "in the absence of any new information or modification of their HCP proposal, we must continue to conclude that the

mitigation and minimization measures in the Seibers' proposed HCP do not meet the permit issuance criteria for an incidental take permit under the ESA." (App. H.)

The Seibers brought suit in the Court of Federal Claims on July 26, 2001, seeking compensation from the United States for a taking, claimed to result from the FWS's permit denial. (App. G.) The complaint included four counts, with three alleging (1) that the ITP denial constituted a categorical physical taking under *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982); (2) that the ITP denial constituted a per se regulatory taking under *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992); and (3) that the denial constituted a taking of reasonable investment-backed expectations under *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978).

On November 26, 2001, the government filed a motion to dismiss the complaint for failure to state a claim or, in the alternative, for summary judgment. The Seibers responded on January 28, 2002, with a cross-motion for summary judgment. Argument on that motion was scheduled for June 6, 2002.

On June 3, 2002, the State Supervisor for the FWS sent a letter to plaintiffs' counsel stating that as a result of a visit by FWS personnel to the Seibers' property on April 21, 2002, the agency had decided that so many trees had blown down during a storm in February 2002, because they were infected with rot root, that there was no longer sufficient timber in the 40-acre protected area to provide suitable habitat for spotted owls. (App. E.) (*See also* Apps. BB, CC, DD, EE, and FF.)

On September 4, 2002, the Court of Federal Claims entered summary judgment in favor of the government. *Seiber v. United States*, 53 Fed. Cl. 570 (2002). (App. C.) The court held that the Seibers' takings claim was not ripe, finding that the FWS's permit denial was not final under the Federal

Circuit's decision in *Boise Cascade Corp. v. United States*, 296 F.3d 1339 (Fed. Cir. 2002). (App. D.)

On the merits, the court concluded that the ITP denial, even if ripe, would not have constituted a taking. 53 Fed. Cl. at 575. The court held that the denial was not a physical taking under *Loretto*, concluding that this very argument had recently been rejected in *Boise Cascade*. *Id.* at 576. Neither did the permit denial constitute a per se regulatory taking under *Lucas*, because the Seibers did not meet the *Lucas*, standard requiring a loss of "'*all* economically beneficial uses'" of the land. *Id.* (emphasis in original) (quoting *Lucas*, 505 U.S. at 1019). Finding that the 40-acre regulated parcel did not constitute "a separate property interest apart from [the] other [160] acre[s] containing merchantable timber," the court held that the Seibers had not lost all economic viability in their land. *Id.* at 577. Finally, the court also applied a "whole parcel" standard in rejecting the Seibers' claim under *Penn Central*.

The Seibers appealed to the Court of Appeals for the Federal Circuit. The Federal Circuit disagreed with the Court of Federal Claims on ripeness, holding that the November 9, 2000, action was final and that the Seibers were entitled to proceed with their temporary takings claim. (Apps. A and B.) The Federal Circuit agreed, however, with the Court of Federal Claims in its rejection of the *Loretto* physical taking and *Lucas* per se regulatory taking claims. (*Id.*)

First, the court rejected the contention that the FWS's permit denial was a physical taking because it denied the Seibers the right to exclude others (*i.e.*, the spotted owls). Relying on *Boise Cascade*, 296 F.3d 1339, the court held that a prohibition against logging in protected owl habitat did not constitute a physical taking.

Second, the court rejected the Seibers' contention that their permit denial constituted a categorical taking under the U.S.

Supreme Court's theory in *Lucas* because it denied them "*all* economically beneficial or productive use" of the 40 acres at issue.

The court rejected the Seibers' categorical takings claim under *Lucas* because the ITP denial did not deprive the Seibers of all economically viable use of the timber on the entire 200-acre parcel, as distinguished from the timber on the 40 acres designated by the government as a spotted owl nesting reserve.

Third, the Federal Circuit also employed a "whole parcel" standard in rejecting the Seibers' claim under *Penn Central* for abrogation of their reasonable investment-backed expectations.

REASONS FOR GRANTING THE PETITION

Under U.S. Supreme Court Rule 10(c), a ground for review exists when a United States Court of Appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided a federal question in a way that conflicts with applicable decisions of this Court. Both of these grounds for review are present in this case.

A. This Case Involves an Important Constitutional Question That Should Be Resolved by This Court.

The precedent established below is the latest in a growing number of cases arising out of government regulations that require property owners to leave their land in its natural condition so that it can be occupied as wildlife habitat and, at the same time, deny the property owner compensation for the imposition of a wildlife servitude. *Cf. Kaiser Aetna v. United States*, 444 U.S. 164 (1979) (involving navigational servitude). These are the same type of wildlife servitudes that the federal government regularly acquires by eminent domain. *See North Dakota v. United States*, 460 U.S. 300 (1983).

1. *The Law Is Unsettled Under the U.S. Supreme Court's "Whole Parcel" Taking Cases.*

In the seminal regulatory taking case of *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922), the Court, in an opinion written by Justice Holmes, stated:

> The general rule at least is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.

Pennsylvania Coal involved a state law that prohibited the defendant from removing pillars of coal that prevented subsidence from occurring after the main body of coal had been mined. The Court's holding that a taking had occurred was based upon three factors: first, the coal pillars were a *separate estate* in real property; second, the defendant had been denied all economic use of the coal in the support pillars; and third, under the regulation there was no "average reciprocity of advantage that has been recognized as a justification of various laws." *Id.*

The Court also rejected the argument made by Justice Brandeis in his dissent:

> If we are to consider the value of the coal kept in place by the restriction, we should compare it with the value of all other parts of the land. That is, with the value not of the coal alone, but with the value of the whole property.

Id. at 419.

The majority's recognition of the coal pillars as a separate estate is relevant here. The property at issue in this case is the merchantable timber on the 40 acres that Petitioners were prevented from harvesting. Oregon has long recognized that standing timber is a separate interest in real property. *Paullus v. Yarbrough*, 347 P.2d 620 (Or. 1959). Moreover, timber is an interest that can be "taken" separately from the land on which it stands. *Hawkins v. City of La Grande*, 843 P.2d 400, 407-08 (Or. 1992). Finally, not only timber, but

individual trees can be the subject of a wrongful taking. Or. Rev. Stat. § 105.810 (2003). (App. KK.) In *Lucas*, the Court quotes from Lord Coke: "'[F]or what is the land but the profits thereof[?]'" 505 U.S. at 1017 (brackets in original). The full sentence reads: "For what is the land but the profits thereof; thereby vesture, herbage, trees, mines, all whatsoever, parcel of that land doth pass." *See* James Burling, *Can Property Value Avert a Regulatory Taking When Economically Beneficial Use Has Been Destroyed, Taking Sides on Taking Issues: Public and Private Perspectives*, 455. The right under English law to compensation for crops taken by the sovereign dates back to the Magna Carta. *Id.* at 454.

The significance of separate estates has, however, become less clear in this Court's decisions since *Pennsylvania Coal*. The "whole parcel" concept next surfaced in *Penn Central*, 438 U.S. 104 . The case involved the protection of a historic landmark, Grand Central Terminal, by prohibiting the plaintiff from building an office tower in the airspace over the old railroad station.

In *Penn Central*, the Court stated:

> The question of what constitutes a "taking" for purposes of the Fifth Amendment has proved to be a problem of considerable difficulty. While this Court has recognized that the "Fifth Amendment's guarantee . . . [is] designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole," *Armstrong v. United States*, 364 US 40, 49, 80 S Ct 1563, 1569, 4 L Ed 2d 1554 (1960), this Court, quite simply, has been unable to develop any "set formula" for determining when "justice and fairness" require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons.

Id. at 123-24 (alterations in original).

It then stated:

> In engaging in these essentially ad hoc, factual inquiries, the Court's decisions have identified several factors that have particular significance. The economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations are, of course, relevant considerations. So, too, is the character of the governmental action. A "taking" may more readily be found when the interference with property can be characterized as a physical invasion by government . . . ."

Id. at 124 (citation omitted).

Without referring to Justice Brandeis' dissent in *Pennsylvania Coal*, the Court went on to state:

> "Taking" jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. In deciding whether a particular governmental action has effected a taking, this Court focuses rather both on the character of the action and on the nature and extent of the interference with rights in the parcel as a whole . . . ."

Id. at 130-31.

In a dissent written by then Justice Rehnquist and joined by the Chief Justice and Justice Stevens, the dissenters argued that a taking had occurred, because in the past the Court had recognized only two exceptions where compensation was not required. The first was the "nuisance exception," when the regulation merely prohibited the landowner from using his property in a manner that would constitute a public or private nuisance. *Id.* at 144-46. The second is when the restriction "applies over a broad cross section of land and thereby 'secure[s] an average reciprocity of advantage.'" *Id.* at 147 (brackets in original) (quoting *Pennsylvania Coal*, 260 U.S. at 415).

In responding to the majority's adoption of the "parcel as a whole" rule, the dissenters stated:

> The Court has frequently held that, even where a destruction of property rights would not *otherwise* constitute a taking, the inability of the owner to make a reasonable return on his property requires compensation under the Fifth Amendment. But the converse is not true. A taking does not become a noncompensable exercise of police power simply because the government in its grace allows the owner to make some "reasonable" use of his property. "[I]t is the character of the invasion, not the amount of damage resulting from it, so long as the damage is substantial, that determines the question whether it is a taking."

Id. at 149-50 (emphasis and brackets in original; citations omitted).

Perhaps the most significant case to apply the "whole parcel" rule was the Court's 5-4 decision in *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470 (1987). The facts in *Keystone* were almost identical to those in *Pennsylvania Coal*. The majority distinguished them on the basis that the legislative act in *Pennsylvania Coal* had sought to protect the private property rights of the surface land owners and that in *Keystone* the legislature was protecting the rights of the public in general against what amounted to a nuisance resulting from subsidence. In arguing against the "whole parcel" rule, the dissenters noted: "Where the estate defined by state law is both severable and of value in its own right, it is appropriate to consider the effect of regulation on that particular property interest." *Id.* at 520.

In another landmark regulatory taking case, the Court established a second per se takings rule in *Lucas*, 505 U.S. 1003. After discussing the *Penn Central* balancing test and the *Loretto* per se physical occupation test, the Court announced a per se test based upon the second prong of the

standard stated in *Agins v. City of Tiburon*, 447 U.S. 255 (1980). A taking occurs when the landowner has been denied all economically beneficial or productive use of his or her property. *Id.* at 1015. In discussing what property interest should be the focus of a taking, the Court in *Lucas* stated:

> Regrettably, the rhetorical force of our "deprivation of all economically feasible use" rule is greater than its precision, since the rule does not make clear the "property interest" against which the loss of value is to be measured. When, for example, a regulation requires a developer to leave 90% of a rural tract in its natural state, it is unclear whether we would analyze the situation as one in which the owner has been deprived of all economically beneficial use of the burdened portion of the tract, or as one in which the owner has suffered a mere diminution in value of the tract as a whole. . . . . Unsurprisingly, this uncertainty regarding the composition of the denominator in our "deprivation" fraction has produced inconsistent pronouncements by the Court. The answer to this difficult question may lie in how the owner's reasonable expectations have been shaped by the State's law of property—*i.e.*, whether and to what degree the State's law has accorded legal recognition and protection to the particular interest in land with respect to which the takings claimant alleges a diminution in (or elimination of) value. In any event, we avoid this difficulty in the present case, since the "interest in land" that Lucas has pleaded (a fee simple interest) is an estate with a rich tradition of protection at common law . . . .

Id. at 1016 n.7 (citations omitted).

Justice Stevens, dissenting in *Lucas*, criticized the new rule because it, together with the "whole parcel" rule, could lead to an arbitrary result, *i.e.*, because it might allow recovery to a landowner who was denied 100 percent of the use of his or her property, but deny recovery to another who was denied 95 percent use of his or her property. *Id.* at 1064.

In *Phillips v. Washington Legal Foundation*, 524 U.S. 156, 164 (1998), the Court again pointed out that it is state property law that defines the property interest that is the subject of the taking, and not the U.S. Constitution.

The next case relevant to a "whole parcel" analysis is *Palazzolo v. Rhode Island*, 533 US 606 (2001). *Palazzolo* is important for two reasons. First, it is important because the Court held that the "whole parcel" rule did not bar a takings claim based upon a *Penn Central* analysis although it did bar one based upon *Lucas*. *Id.* at 630. Thus the rule no longer applies under the *Penn Central* ad hoc analysis, even though the "whole parcel" rule was first enunciated in that case. The second reason *Palazzolo* is important is the following statement by the Court:

> [Plaintiff] argues, for the first time, that the upland parcel is distinct from the wetlands portions, so he should be permitted to assert a deprivation limited to the latter. This contention asks us to examine the difficult, persisting question of what is the proper denominator in the takings fraction. See Michelman, Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation Law," 80 Harv. L.Rev. 1165, 1992 (1967). Some of our cases indicate that the extent of deprivation effected by a regulatory action is measured against the value of the parcel as a whole, see, *e.g.*, *Keystone Bituminous Coal Assn. v. DeBenedictis*, 480 U.S. 470, 497, 107 S.Ct. 1232, 94 L.Ed.2d 472 (1987); but we have at times expressed discomfort with the logic of this rule, see *Lucas, supra*, at 1016-1017, n.7, 112 S.Ct. 2886, a sentiment echoed by some commentators, see, *e.g.*, Epstein, Takings: Descent and Resurrection, 1987 S.Ct. Rev. 1, 16-17 (1987); Fee, Unearthing the Denominator in Regulatory Takings Claims, 61 U. Chi. L.Rev. 1535 (1994). Whatever the merits of these criticisms, we will not explore the point here.

Id. at 631.

Finally, in *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302 (2002), the Court held that although the "parcel as a whole" rule barred the plaintiffs from recovering based upon a *Lucas* per se theory for a temporary taking arising out of a planning moratorium, it indicated some of the plaintiffs might have been able to recover under a *Penn Central* or *Agins* theory. *Id.* at 334.

As Professor Richard Epstein points out in his article cited in *Palazzolo*, the denominator problem involved in the "whole parcel" rule was first discussed by Professor Michelman and he rejected the rule, although Justice Stevens in *Keystone* infers Michelman's support for it. Richard Epstein, *Takings: Descent and Resurrection*, 1987 Sup. Ct. Rev. 1, 16-17 (1987).

Epstein then quotes from the foregoing Michelman article:

> "Inasmuch as mining rights are well recognized, divisible interests in land, and inasmuch as 'rights' to particular surface uses have come to be recognized as species of 'property' under the label of 'easement' or 'servitude,' why not say that any land consists of two 'things'—mining rights and surface rights, or foundry rights and residue—and that the relevant denominator in testing a regulation which impinges only on mining rights or foundry rights is the value of those rights—which the regulation totally destroys?"

Id. (quoting Michelman, *supra*, at 1193).

Referring to the Court's statements concerning the whole parcel rule in both *Penn Central* and *Keystone*, Professor Epstein goes on to state:

> [N]o amount of precedent can render coherent a position that is not. The general principle of eminent domain law has always been, and logically must be, this: What has the state taken, and not what has the owner retained.

Id. at 17.

The record in this case provides a sound foundation upon which the Court can clarify the law. The fact that the government left other timber undisturbed completely ignores the loss to the Seibers in not being able to harvest the 40 acres. The value of that timber was largely destroyed due to trees being blown down because of root rot which developed while Petitioners were prohibited from logging. (App. E.)

2. *Under a Physical Taking Theory, the Test Is Whether the Landowner Has the Right to Exclude Wildlife, Not Whether the State Has Control over It.*

Petitioners' tree farm is located about six miles southeast of the town of Sweet Home, Oregon. It was in another case involving that very community and spotted owls, but in which a "taking" of the species rather than property was the issue, that Justice Scalia prophetically wrote: "The Court's holding that the hunting and killing prohibition incidentally preserves habitat on private lands imposes unfairness to the point of financial ruin—not just upon the rich, but upon the simplest farmer who finds his land conscripted to national zoological use." *Babbitt v. Sweet Home Ch. of Communities for a Great Or.*, 515 U.S. 687, 714 (1995).

This Court in *Tahoe-Sierra*, 535 U.S. 302, clearly stated the difference between a physical taking and a regulatory taking. A physical taking (1) involves the government's use of the property for a public purpose and (2) denies landowners the right to exclude others from their property. *Id.* at 324 n.19. "A regulatory taking, by contrast, does not give the government any right to use the property, nor does it dispossess the owner or affect her right to exclude others." *Id.*

In this case, the government, by its regulation, has both claimed the right to use Petitioners' property for spotted owl nesting habitat and prevented Petitioners from taking any action to exclude the owls by harvesting their habitat.

Thus, in *Boise Cascade* and here, the Federal Circuit shifted the focus of this Court's physical taking jurisprudence from the issue of whether there had been a forced occupation authorized by government to whether government had control over the occupant, which this Court has never deemed to be the determining factor. *Loretto*, 458 U.S. at 432 n.9; *Yee v. City of Escondido, Cal.*, 503 U.S. 519, 522-23 (1992).

In a physical taking case, the key issue is whether the landowner has the right to exclude the government-authorized occupant and has been forced to acquiesce to the occupation. *Yee*, 503 U.S. at 527; *Kaiser Aetna*, 444 U.S. at 176. Due to the ESA and state regulations that impose similar wildlife servitudes, there are a growing number of cases arising out of government requiring private landowners to subordinate the use of their property to a dominant use of it by the government to protect wildlife. *Christy v. Hodel*, 857 F.2d 1324, 1335 (9th Cir. 1988) (government does not "control the conduct" of wildlife species), *cert. denied*, 490 U.S. 1114 (1989) (see dissenting opinion of Justice White); *Fla. Game & Fresh Water Fish Comm'n v. Flotilla, Inc.*, 636 So. 2d 761, 764 (Fla. Dist. Ct. App.) (landowner can use its property "in any way that would not disturb the eagles' natural habitat"),[1] *rev. denied*, 645 So. 2d 452 (Fla. 1994).

Here, the subject regulation goes beyond merely regulating the use of Petitioners' land; it requires that the timber on it be left standing for the sole purpose of providing spotted owl habitat. Clearly, it is a use of private property by the government for a public purpose. *Yee*, 503 U.S. at 522-23. And most importantly, Petitioners cannot harvest 40 acres of trees that have taken them decades to grow and on which they depend for income during their retirement years. Petitioners

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[1] *See* William K. Jones's (Charles Evans Hughes Professor of Law at Columbia University) criticism of the *Flotilla* decision, describing it as a "classic" example of a physical taking. *Confiscation: A Rationale of the Law of Takings*, 24 Hofstra L. Rev. 1, 61-62 (1995).

have no choice under the subject regulation but to acquiesce to the occupation of their timber as a nesting site. *Id.* at 527 ("The government effects a physical taking only where it *requires* the landowner to submit to the physical occupation of his land." (emphasis in original)).

The subject regulation not only imposes a wildlife servitude upon Petitioners' timber, but it also singles them out to bear a burden that is not imposed upon many of their neighbors who own commercial timberlands. *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825 (1987); *Tahoe-Sierra*, 535 U.S. at 340-41. The subject regulation does not require that all owners of commercial timberlands set aside timber to provide nesting habitat for spotted owls; it is directed only at those who happen to have an existing nesting site on their property or within the 70-acre protected area.

As one scholar has stated: "Unlike zoning regulations that spread the burdens and benefits so as to create an average reprocity of advantage, the ESA burdens only a few landowners who unfortunately provide a habitat for a protected species." Stephen P. Foley, Comment, *Does Preventing "Take" Constitute an Unconstitutional "Taking"?: An Analysis of Possible Defenses to Fifth Amendment Taking Claims Based on the Endangered Species Act*, 14 UCLA J. Envtl. L. & Pol'y 327, 344 (1995-96).

By failing to provide compensation to those owners who do have spotted owl nesting habitat, the government is encouraging other owners of private timberlands to manage their timber so that trees are harvested earlier, before they can become suitable spotted owl nesting habitat. *See* Ike C. Sugg, *Caught in the Act: Evaluating the Endangered Species Act, Its Effects on Man and Prospects for Reform*, 24 Cumb. L. Rev. 1, 45 (1993-94). Otherwise, as in this case, an occupation by owls will render their timber without any commercial value. The government's short-sighted policy

serves neither the best interest of the owls, nor that of those citizens whose timber is appropriated for owl habitat.

As Justice Holmes stated in *Pennsylvania Coal*, 260 U.S. at 416: "We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change."

B. The Petition Should Be Granted Because the Decision Below Conflicts with Decisions of This Court and Other Federal and State Courts.

The U.S. Supreme Court's regulatory taking analysis has been described as a "muddle," and a whole forest has been consumed by the law reviews written about it. *See* Carol M. Rose, *Mahon Reconstructed: Why the Takings Issue Is Still a Muddle*, 57 S. Cal. L. Rev. 561 (1984); Mark Sagoff, *Muddle or Muddle Through? Takings Jurisprudence Meets the Endangered Species Act*, 38 Wm. & Mary L. Rev. 825 (1997); Steven Ward, *Lucas v. South Carolina Coastal Council: A Categorical Rule in the Muddle of Takings Analysis*, 61 UMKC L. Rev. 165 (1992).

The U.S. Supreme Court now has a *Penn Central* "ad hoc" analysis to which it originally applied the "whole parcel" rule, but the rule no longer applies in cases involving that standard. *Palazzolo*, 533 U.S. at 630. Nor does the "whole parcel" rule apply to regulatory takings involving a physical occupation per se analysis. *Loretto*, 458 U.S. at 434-35. The "whole parcel" rule does not apply to a *Lucas* per se analysis, but then the question becomes: to what property interest does the rule apply? 505 U.S. at 1016 n.7. And the Court has recently raised the issue of whether it should apply at all. *Palazzolo*, 533 U.S. at 631.

Then there is an *Agins* analysis involving whether the regulation substantially advances a legitimate government

interest, and again the "whole parcel" rule is irrelevant under that standard. *Tahoe-Sierra*, 535 U.S. at 334. Nor does it apply under an *Eastern Enterprises* analysis in which the government singles out a property owner to bear the burden of providing a remedy for a social problem that the owner did not create.

The confusion has become so great that in the recent *Tahoe-Sierra* case the Court felt it necessary to review at length its regulatory takings jurisprudence. In doing so, it pointed out that it had stated different rules to govern regulatory takings involving physical occupations and those that do not, and that the precedents for one type should not be used in cases involving the other. *Id.* at 323. The Court then stated a bright-line test for distinguishing physical takings from other regulatory takings. *Id.* at 324 n.19.

The confusion only becomes greater when a temporary taking is involved. When a temporary taking involves a planning moratorium, a *Lucas* per se analysis is not appropriate. *Id.* at 331-32. However, a *Lucas* analysis is applicable if the original taking was permanent and the government later rescinds its restriction. *Lucas*, 505 U.S. at 1030 n.17; *Seiber v. United States*, 364 F.3d 1356, 1364-65 (Fed. Cir. 2004). But even in moratorium cases the plaintiffs may be able to proceed on a *Penn Central* or *Agins* theory. *Tahoe-Sierra*, 535 U.S. at 334.

As for physical takings, this Court recently stated a physical taking is "typically obvious and undisputed" and should be "easily identified." *Id.* at 322 n.17, 324. While physical appropriations of private property for a public purpose may be obvious to landowners, they are not always easily identified by the lower courts and all too often they are disputed by the government through a long and expensive litigation process. *Id.* at 322 n.17; *e.g., Tulare Lake Basin Water Storage Dist. v. United States*, 49 Fed. Cl. 313, 318 (2001); *Boise Cascade Corp. v. Or. State Bd. of Forestry*, 991

P.2d 563, 570 (Or. Ct. App. 1999); *see also Del Monte Dunes at Monterey, Ltd. v. City of Monterey*, 920 F.2d 1496 (1990), *appeal after remand*, 95 F.3d 1422 (9th Cir. 1996), *aff'd*, 526 U.S. 687, 698 (1999) (which, although tried as regulatory taking claim, in part involved habitat for endangered Smith's Blue Butterfly). By arguing that such cases should be analyzed as a regulatory taking rather than as a physical taking, the government stands a much better chance of avoiding liability for having made use of a landowner's property for a public purpose.

The government's argument for a regulatory analysis is that its need to protect threatened or endangered wildlife habitat trumps almost any limitation imposed on the owner's productive use of the property. *Tulare Lake*, 49 Fed. Cl. at 318-19. From the government's standpoint, the property owner's investment-backed expectations, compared to the need to protect endangered or threatened wildlife, are irrelevant. To many in government, the protection of such wildlife, like the protection of historic sites, must be protected at all costs; however, because those costs may be more than most taxpayers are willing to bear, it is often the government's position (supported by some in the academic community) that the costs should be borne by the landowner and not the public.[2] *Id.*; *see Penn Central*, 438 U.S. at 138-42 (Rehnquist, J., dissenting).

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[2] In support of this view, a number of academics argue that this Court has taken an anachronistic approach to takings cases involving natural habitat, based upon an archaic view of property rights that must change in order to save the environment. James P. Karp, *A Private Property Duty of Stewardship: Changing Our Land Ethic*, 23 Envtl. L. 735, 737 (1993) ("The natural systems upon which we as a community rely for survival must be protected, and if private property rights must be sacrificed to achieve that protection, so be it."); *see also* David B. Hunter, *An Ecological Perspective on Property: A Call for Judicial Protection of the Public's Interest in Environmentally Critical Resources*, 12 Harv. Envtl. L. Rev. 311 (1988); Joseph L. Sax, *Property Rights and the Economy of*

Courts are well aware of the impact takings cases can have on the public treasury and have not been hesitant to seek ways to avoid this Court's takings jurisprudence. See Justices Scalia and O'Connor dissenting from a denial of certiorari in *Stevens v. City of Cannon Beach*, 510 U.S. 1207 (1994); and *Dolan v. City of Tigard*, 854 P.2d 437 (Or. 1993), *rev'd*, 512 U.S. 374 (1994). Here, Petitioners' timber has been appropriated for a public purpose, which brings the facts of this case squarely within the definition of a physical taking. *Tahoe-Sierra*, 535 U.S. at 322.

CONCLUSION

Petitioners respectfully urge the Court to grant their Petition for Writ of Certiorari.

Dated this 16th day of July, 2004.

Respectfully submitted,

PHILLIP D. CHADSEY *
CHARLES F. ADAMS
STOEL RIVES LLP
900 SW Fifth Avenue, Suite 2600
Portland, OR 97204-1268
(503) 294-9376

* Counsel of Record

Counsel for Petitioners

July 16, 2004

Nature: Understanding Lucas v. South Carolina Coastal Council, 45 Stan. L. Rev. 1433, 1445 (1993); Eric T. Freyfogle, *The Owning and Taking of Sensitive Lands*, 43 UCLA L. Rev. 77, 105-06 (1995).

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

03-5010

MARSHA SEIBER and ALVIN SEIBER
Plaintiffs-Appellants,

v.

UNITED STATES,
Defendant-Appellee.

JUDGMENT

ON APPEAL from the United States Court of Federal Claims *in CASE NO(S).01-CV-432*

This CAUSE having been heard and considered, it is ORDERED and ADJUDGED:

AFFIRMED

Entered By Order of The Court

DATED APRIL 19, 2004 /s/ Jan Horbaly, Clerk
JAN HORBALY, Clerk

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

03-5010

MARSHA SEIBER and ALVIN SEIBER,
Plaintiffs-Appellants,

v.

UNITED STATES,
Defendant-Appellee.

DECIDED: April 19, 2004

Before NEWMAN, LOURIE, and DYK, *Circuit Judges*.

DYK, *Circuit Judge*.

This is a Fifth Amendment temporary takings case involving the Fish and Wildlife Service's ("FWS") denial of a federal incidental take permit ("ITP") to authorize logging on a forty-acre tract of land in Oregon belonging to the appellants Marsha and Alvin Seiber (the "Seibers"). The Court of Federal Claims granted summary judgment for the government, holding that the takings claim was not ripe and that, in any event, the permit denial did not constitute a taking under the Fifth Amendment. *Seiber v. United States*, 53 Fed. Cl. 570 (2002). We hold that the Seibers' claim was ripe for review. On the merits, we affirm because the permit denial was neither a physical nor a regulatory taking.

BACKGROUND

The Endangered Species Act ("ESA"), 16 U.S.C. §§ 1531-1544 (2000), prohibits the "take" of an endangered species, *id.* § 1538(a)(1)(B), which includes harassing, harming, pursuing, wounding or killing such an animal, *id.* § 1532(19). .The Environmental Protection Agency ("EPA") defines the ESA prohibition against "harming" endangered species to include "significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering." 50 C.F.R. § 17.3 (2004). *See generally Babbitt v. Sweet Home Chapter of Cmtys. for a Great Or.*, 515 U.S. 687 (1995). The ESA also provides a permitting mechanism to allow the "incidental take" of an endangered or threatened species in certain circumstances,-authorizing "any taking otherwise prohibited . . . if such taking is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity." 16 U.S.C. § 1539(a)(1)(B).

The ESA invests the Secretary of the Department of the Interior with the authority to "determine whether any species is an endangered species or a threatened species." *Id.* § 1533(a)(1). Pursuant to this responsibility, the FWS, a division of the Department of the Interior, listed the northern spotted owl as a threatened species in 1990. Endangered & Threatened Wildlife & Plants; Determination of Threatened Status for the Northern Spotted Owl, 55 Fed. Reg. 26,114 (June 26, 1990).

Oregon maintains a system of endangered species protection as well, which co-exists and overlaps with the federal system. *See* Or. Rev. Stat. § 496.182(1) (2003). Oregon law defines the term "endangered species" as including species so designated by the Oregon State Fish and Wildlife Commission or by the federal ESA.

Id. 496.004(6), 496.176. Oregon law requires the implementation of rules "necessary to ensure the survival" of such

endangered species, including the protection of nesting sites that are "critical to the survival of individual members of the species." *Id.* 496.182(2). Once the Oregon Department of Forestry ("ODF") has designated a certain area as protected habitat for an endangered species, an individual may engage in otherwise prohibited activity only by securing a federal ITP from the federal FWS. *See* Or. Admin. R. 629-665-0210(5) (2004).

The Seibers own a two hundred-acre parcel of land in Linn County, Oregon, which included merchantable timber. In January 1996 ODF implemented regulations to protect the northern spotted owl in accordance with the FWS's determination of their threatened status. ODF designated a seventy-acre area in Linn County, Oregon, as a protected spotted owl-nesting habitat, including forty acres of the Seibers' two hundred-acre property.

On February 4, 1998, the Seibers submitted a "written plan" to ODF, as required by Oregon law, to log timber on the regulated forty acres. *See* Or. Rev. Stat. § 527.670 (1994); Or. Admin. R. 629-665-0210(1) (2004). ODF rejected the Seibers' logging application on February 19, 1998, explaining that ODF could not make an exception to the protected status of the nesting site unless the Seibers procured a federal permit (an ITP) in accordance with the ESA. The Seibers sought a hearing at the Oregon Board of Forestry, arguing that the ODF rule should be withdrawn because it constituted a taking of their properly. *See* Or. Admin. R. 629-672-0200 (2004). On March 28, 1998, the Oregon Board of Forestry affirmed ODF's denial, finding that "[t]he denial of the Seiber's [sic] written plan was appropriate [and did] not cause a taking under the U.S. or the Oregon Constitutions." (J.A. at 266.) The Seibers appealed to the Circuit Court of the State of Oregon for the County of Linn, which dismissed their action because "[t]akings claims are not ripe for adjudication until the Seibers apply for an Incidental Take Permit from the U.S.

Fish & Wildlife Service." *Seiber v. State*, No. 98-0649 (Or. App. Dec. 17, 1999). The Seibers apparently did not seek review in the Supreme Court of Oregon.[1]

Meanwhile, on November 24, 1999, the Seibers submitted an ITP application to the FWS, seeking a permit to log on their regulated forty acres. The Seibers' application included a Habitat Conservation Plan ("HCP"). Such a plan is required to describe the likely impact of the requested "take," the applicant's plan to "minimize and mitigate such impacts," the alternative options pursued by the applicant, and the reasons those options were not ultimately chosen. 16 U.S.C. § 1539(a)(2)(A)(i). As of January 3, 2000, the Seibers had yet to receive a response from the FWS, and they sent a letter requesting notice to be published in the Federal Register within ten days in order to commence with the required public notice and comment period.[2] On January 11, 2000, the FWS responded, explaining that it was reviewing the ITP application, in particular the HCP, to determine whether it contained the necessary information. On February 7, 2000, the Office of the Solicitor of the Department of the Interior

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[1] The Seibers have instituted separate actions seeking compensation from the State of Oregon for a temporary taking. In the first of these cases the Seibers' claims were rejected on summary judgment in the Circuit Court for the State of Oregon for Linn County. The Court of Appeals of Oregon in *Seiber v. State ex. rel. Or. State Bd. of Forestry*, 37 P.3d 259 (Or. App. 2001), affirmed without opinion, and the Supreme Court of Oregon denied review, 47 P.3d 486 (Or. 2002), as did the United States Supreme Court, 537 U.S. 1104 (2003). The second case, *Seiber v. State*, No. 01-0333, is pending in the Circuit Court for Linn County.

[2] Notice in the Federal Register is a required preliminary step in the ITP application process, intended to allow an "opportunity for public comment" on the application and the related conservation plan, 16 U.S.C. § 1539(a)(2)(B), and to ensure that "[i]nformation received by the [FWS] as part of [the] application shall be available to the public as a matter of public record at every stage of the proceeding," *id.* § 1539(c). *See also Gerber v. Norton*, 294 F.3d 173,176 (D.C. Cir. 2002).

advised the Seibers that "[a]ccording to the FWS, the application lacks much of the biological analysis and information routinely provided by their other applicants [and] was prepared without any discussion with the Service employees." (J.A. at 217.) In particular, the letter highlighted that the Seibers' ITP application did not seem to follow the steps outlined in the FWS's Habitat Conservation Handbook. The Seibers replied on February 9, 2000, disagreeing that the HCP was inadequate and urging that prior "closely parallel[]" HCPs had been accepted by the FWS. (J.A. at 218.) The Seibers stated that "[i]t seems that the [FWS] is engaging in 'make weight' arguments not to publish [in the Federal Register]. There is no desire on the Seibers' part to discuss modifications to the permit application and the process can be expedited by publishing notice in the Federal Register without further delay." (J.A. at 218-19.) Notice was published in the Federal Register on February 18, 2000, notifying the public of the Seibers' ITP application and requesting written comments on the permit application and HCP by March 20, 2000.

After completion of the notice and comment period, the FWS formally rejected the Seibers' ITP application on July 6, 2000, on the ground that the application did not satisfy applicable criteria for mitigation. The FWS stated that "[b]ecause minimization and mitigation programs exist that are based on a sound biological rationale, are commensurate with the impacts they address, and are practicable, we have come to the conclusion that the mitigation offered in the [Seibers'] HCP does not meet" the ITP criteria. (J.A. at 228.) The letter also suggested alternatives "under which we believe a permit could be issued," including selective harvesting of the regulated forty acres, harvesting of the regulated forty acres that would eliminate suitable habitat initially but regenerate such habitat within a specific amount of time, or harvesting of the unregulated one hundred sixty acres. (J.A. at 229.) Finally, the FWS letter informed the

Seibers of their right to request reconsideration of the denial in accordance with 50 C.F.R. § 13.29. The Seibers requested reconsideration of the ITP denial on July 28, 2000. Reconsideration was denied, and the Seibers appealed to the Regional Director of the FWS on September 26, 2000. The Regional Director denied the appeal on November 9, 2000, explaining that "in the absence of any new information or modification of their HCP proposal, we must continue to conclude that the mitigation and minimization measures in the Seibers' proposed HCP do not meet the permit issuance criteria for an incidental take permit under the ESA." (J.A. at 47.)

The Seibers brought suit in the Court of Federal Claims on July 26, 2001, seeking compensation from the United States for a taking, claimed to result from the FWS's permit denial. The complaint included four counts, alleging: (1) that the ITP denial constituted a categorical physical taking under *Loretto v. Teleprompter Manhattan CAN Corp.*, 458 U.S. 419 (1982); (2) that the ITP denial constituted a per se regulatory taking under *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992); (3) that the ITP denial constituted both a temporary and a permanent regulatory taking under *Agins v. City of Tiburon*, 447 U.S. 255 (1980), because the FWS could not advance a legitimate governmental interest for the denial[3]; and (4) that the ITP denial constituted a regulatory taking under the test of *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978).

Subsequent to the filing of the complaint, on August 3, 2001, the ODF informed the Seibers that it no longer opposed logging on the forty-acre area in question because the land

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[3] The temporary takings allegation of this claim was later abandoned because, as the Seibers' counsel explained, it was based on the mistaken theory that the government had secured an injunction to prevent the Seibers from logging. Oral Argument Tr. at 25-26, *Seiber v. United States*, No. 01-432L (Fed. Cl. June 6, 2002).

was no longer inhabited by the spotted owls and did not require ongoing protection. The Seibers in turn wrote to the FWS on August 7, 2001, asking whether the forty-acre site was considered a protected habitat and whether the FWS would oppose logging. The FWS responded in a letter dated September 12, 2001, stating that it had never barred logging on the Seibers' property despite the fact that it had declined to issue an ITP. The FWS's letter stated:

> The Service has not opposed logging proposed by the Seibers. The Seibers' initial permit application, however, did not meet permit issuance criteria found at section 10 of the Endangered Species Act (ESA). Issuance of an incidental take permit provides those acting under permit authority with the assurance that their activities may proceed without risk of violating the prohibitions of section 9 of the ESA. The Service has offered technical assistance in developing an incidental take permit application meeting issuance criteria. Should the Seibers decline to accept the Service's offer and choose to proceed with logging without a section 10 permit, any take which may occur would not be authorized under the ESA.

(J.A. at 237.)

On November 26, 2001, the government filed a motion to dismiss the complaint for failure to state a claim or, in the alternative, for summary judgment. The Seibers responded on January 28, 2002, with a cross-motion for summary judgment. Subsequent to these filings, the FWS visited the Seibers' property in April of 2002 at the direction of the Court of Federal Claims to "develop alternatives for [the] Seiber[s] to consider in the development of a habitat conservation plan." P.A. at 14.) Following this visit, the FWS sent the Seibers a letter on June 3, 2002, announcing that an ITP was no longer necessary because changes in the "landscape conditions" as well as the spotted owls' nesting patterns

indicated that "the area will no longer be likely to attract and maintain spotted owls" and that therefore "the planned activities by the Seibers are not likely to result in a take of the spotted owls under the Endangered Species Act." (J.A. at 15.) Despite this determination by the FWS, the Seibers informed the Court of Federal Claims during oral argument that they would continue to pursue their claims but do so in the context of temporary rather than permanent takings.

Thereafter, on September 4, 2002, the Court of Federal Claims entered summary judgment in favor of the government. The court held that the Seibers' takings claim was not ripe, finding that the FWS's permit denial was not final under our court's decision in *Boise Cascade Corp. v. United States*, 296 F.3d 1339 (Fed. Cir. 2002), because the "FWS had the discretion and an indicated willingness to consider a modified plan." *Seiber*, 53 Fed. Cl. at 575.

On the merits, the court concluded that the ITP denial, even if ripe, would not have constituted a taking. *Id.* The court held that the denial was not a physical taking under *Loretto*, concluding that this very argument had recently been rejected in *Boise Cascade*. *Id.* at 576. Neither did the permit denial constitute a per se regulatory taking under *Lucas* because the Seibers did not meet the *Lucas* standard requiring a loss of "all economically beneficial uses" of the land. *Id.* (quoting *Lucas*, 505 U.S. at 1019) (emphasis in original). Finding that the forty-acre regulated parcel did not constitute "a separate property interest apart from [the] other [one hundred sixty] acre[s] containing merchantable timber," the court held that the Seibers had not lost all economic viability in their land. *Id.* at 577. Likewise, the court denied the Seibers' *Agins*-based regulatory takings claim on the ground that the Seibers never asserted that "the government's interest in protecting the northern spotted owl is not legitimate," but asserted instead that "the interest in protecting the owl was not 'sufficient to cause' the government to designate private lands

as critical habitat." *Id.* at 578. This assertion, the court held, did not state a takings claim under *Aqins*. Finally, the court rejected the Seibers' regulatory takings claim under *Penn Central* because the Seibers did not make a sufficient showing of the economic impact on their property that resulted from the alleged taking or a sufficient showing that they were "singled out" to bear the burden of the ESA. *Id.* at 580.

The Seibers appeal the Court of Federal Claims' grant of summary judgment in favor of the government. We have jurisdiction pursuant to 28 U.S.C. § 1295(a)(3).

DISCUSSION

We review the Court of Federal Claims' grant of summary judgment without deference. *Agwiak v. United States*, 347 F.3d 1375, 1377 (Fed. Cir. 2003).

We note at the outset that there is a predicate question that we need not decide—whether federal law actually barred logging on the Seibers' property. There is, of course, no federal taking if federal law did not bar the logging. *See Yuba Natural Res., Inc. v. United States*, 821 F.2d 638, 640 (Fed. Cir. 1987) (explaining that a regulatory taking requires that "the government action has destroyed the owner's use and enjoyment of his property" in full or in part). Unlike the situation in *Boise Cascade*, there was no federal injunction barring logging of the Seibers' property. *See Boise Cascade*, 296 F.3d at 1346. In the absence of such an injunction, it is not clear that federal law barred the logging. As the FWS explained in its letter dated September 12, 2001, nothing in the ESA required the Seibers to obtain an ITP before logging. Rather, an "incidental take permit provides those acting under permit authority with the assurance that their activities may proceed without risk of violating the prohibitions of section 9 of the ESA." (J.A. at 237.) The question then becomes whether the ESA itself prohibited logging of the Seibers' land

because it would adversely affect the owl habitat. For purposes of this opinion we assume, without deciding, that federal law prohibited the logging during the period of the alleged taking, November 9, 2000-June 3, 2002.

II

The procedural posture of this case is unusual. Following the filing of the government's motion for summary judgment and the Seibers' opposition, the Seibers agreed to abandon the temporary takings claim in count three of their complaint, their only temporary takings claim (which was apparently based on the mistaken theory that the government had secured an injunction to prevent the logging). Oral Argument Tr. at 25-26, *Seiber v. United States*, No. 01-432L (Fed. Cl. June 6, 2002). Then, as noted above, on June 3, 2002, the government informed the Seibers by letter that logging of the entire two hundred-acre parcel was permitted. At this juncture, the Seibers appeared to agree that the only claim available to them was for a temporary taking. Under such circumstances, it might have been expected that the Seibers would seek leave to amend their complaint to state a new temporary takings claim, and that the government would file a new summary judgment motion addressing this temporary takings claim. Neither occurred. Rather, both parties appeared at the Court of Federal Claims for oral argument on June 6, 2002, where they effectively agreed that the complaint should be treated as amended to state a temporary takings claim and that the summary judgment motion should be treated as addressed to such a claim. Oral Argument Tr. at 26-27, *Seiber v. United States*, No. 01-432L (Fed. Cl. June 6, 2002). We do not condone the informality of the procedures followed by the parties and the Court of Federal Claims. Such informality creates a confusing record on appeal. But the Seibers do not contend on appeal that they should have been able to supplement the record on the temporary takings issue. Under these circumstances we shall treat the complaint as effectively

amended and the government's motion for summary judgment as addressed to the temporary takings claim. We thus consider the propriety of the summary judgment on the record made in the Court of Federal Claims on the government's original motion.

III

The Supreme Court has recognized that property owners should be compensated for temporary regulatory takings as well as permanent ones. *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 318 (1987). Such takings "are not different in kind from permanent takings, for which the Constitution clearly requires compensation," *id.* (citing *San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621, 657 (1980) (Brennan, J., dissenting), because the loss imposed on a property owner by a temporary taking "may be great indeed," *id.* at 319. Supreme Court cases, as well as decisions from our own court, recognize that a temporary taking may arise in one of two ways. First, "a temporary taking occurs when what would otherwise be a permanent taking is temporally cut short." *Wyatt v. United States*, 271 F.3d 1090, 1097 n.6 (Fed. Cir. 2001). Temporary takings of this category may result when "a court invalidates a regulation" that had previously effected a taking, id.; when "the government elects to discontinue regulations after a taking has occurred," *id.*; or when "the government denies a permit . . . [and] at some [later] point reconsiders the earlier denial and grants a permit (or revokes the permitting requirement)," *Boise Cascade*, 296 F.3d at 1347. The "essential element" of this type of temporary taking "is a finite start and end to the taking," *Wyatt*, 271 F.3d at 1097 n.6. In the case of a rescinded permit denial, therefore, "the initial denial of a permit is still a necessary trigger" for the temporary taking. *Boise Cascade*, 296 F.3d at 1347.

Alternatively, a temporary "taking may occur by reason of extraordinary delay in [the] governmental decisionmaking" process. *Wyatt*, 271 F.3d at 1098 (quoting *Tabb Lakes, Ltd. v. United States*, 10 F.3d 796, 803 (Fed. Cir. 1993)) (internal quotation marks omitted); *see also Cooley v. United States*, 324 F.3d 1297, 1306 (Fed. Cir. 2003); *Boise Cascade*, 296 F.3d at 1347 n.6. In such a case, a property owner may be entitled to compensation for property loss incurred while the government was in the process of deciding whether to allow the contested activity. This type of temporary takings claim may be asserted "notwithstanding the failure [of the government] to deny a permit" or affirmatively prohibit a certain use of the property. *Boise Cascade*, 296 F.3d at 1347 n.6. Nonetheless, "mere fluctuations in value during the process of governmental decisionmaking, absent extraordinary delay" do not give rise to a compensable temporary taking under this second category because such losses are considered "incidents of ownership." *See Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 332 (2002); *see also Cooley*, 324 F.3d at 1306. Each of these categories of temporary takings is governed by its own standards. A property owner asserting a temporary taking as a result of the rescission of a regulation or the eventual grant of a permit that was initially denied is not required to show extraordinary delay. *See Boise Cascade*, 296 F.3d at 1349 ("[A]bsent denial of the permit, only an extraordinary delay in the permitting process can give rise to a compensable taking.").

The temporary taking in this case is alleged to fall in the former category—the effective rescission of the permit denial. The Seibers claim a temporary taking from November 9, 2000 (the date their permit was finally denied on appeal) to June 3, 2002 (the date the FWS informed the Seibers that there were no further federal impediments to logging their forty acres). In order to establish a temporary taking, the Seibers must show a final denial. The question is

whether "the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue." *Williamson County Req'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 186 (1985). The government argues that the FWS's November 9, 2000, action did not constitute a final permit denial and that the Seibers' claim is not ripe for review. The government contends that the FWS's permit denial was not a final decision because it indicated that "several possible alternative plans" were available, Br. of Appellee at 22, and the Seibers declined to pursue ongoing discussion with the FWS. The Court of Federal Claims agreed. Under our decision in *Cooley*, 324 F.3d at 1297, however, we hold that the November 9, 2000, action was final, and the Seibers are-entitled to proceed with their temporary takings claim.

In *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001), the Supreme Court considered when the denial of a permit becomes a ripe regulatory taking. The Court emphasized that the crux of this ripeness analysis is whether "the permissible uses of the property are known to a reasonable .certainty." *Id.* at 620. Following *Palazzolo*, we explained in *Cooley* that "[a] permit denial is final when the applicant has no appeal mechanism available and the denial is based on an unchanging fact." 324 F.3d at 1302. In *Cooley* the appellants were denied a fill permit under section 404 of the Clean Water Act, 33 U.S.C. § 1344 (2000). *Cooley*, 324 F.3d at 1299. The government argued, however, that this permit denial was not a final decision. *Id.* at 1302. We held that the appellants' takings claim was ripe because the permit denial was "based on what [the government] considered adequate information, and because no . . . regulation permitted an administrative appeal." *Id.* Furthermore, we held that the fact that the permit denial letter "extended an invitation to [the appellants] to submit more information if [they] wished to continue to pursue a permit . . . did not alter the finality of the

denial or the ripeness of [the appellants] taking claim in the Court of Federal Claims." *Id.* at 1303. Rather, the denial was based on unchangeable facts and a regulatory scheme that did not permit reconsideration of a denial, neither of which would be affected by the submission of further information in support of the permit application.

As in *Cooley*, the FWS permit denial here was final. Despite the fact that the FWS repeatedly referred to the inadequacy of the Seibers' Habitat Conservation Plan, the FWS made clear to the Seibers that they were denied an ITP. The FWS did not communicate that it lacked adequate information to decide whether to grant or deny the ITP application. Instead, the FWS informed the Seibers that their "application must be denied" because it was insufficient to warrant an ITP. (J.A. at 225.) The FWS itself highlighted the finality of this denial by informing the Seibers of their right to request reconsideration of the denial. The Seibers sought reconsideration in accordance with 50 C.F.R. § 13.29(a)(1), and they subsequently appealed the denial of reconsideration as outlined in § 13.29(e). The Regional Director of the FWS denied this appeal on November 9, 2000, concluding that "the mitigation and the minimization measures in the Seibers' proposed HCP do not meet the permit issuance criteria for an incidental take permit under the ESA." (J.A. at 47.) Despite the Regional Director's offer to provide "technical assistance to the Seibers if they wish to develop an improved HCP," (J.A. at 48), the regulations clearly conceive of this letter as a final permit denial, stating that "[t]he decision of the Regional Director or the Director shall constitute the final administrative decision of the Department of the Interior." 50 C.F.R. § 13.29(0(3) (2004). Because the regulatory scheme governing the ITP process deemed the government's action final and did not allow any further reconsideration, the government's invitation to continue discussion at the Seibers' initiative, as in *Cooley*,

"did not alter the finality of the denial or the ripeness of [the appellants] taking claim." *See Cooley*, 324 F.3d at 1303.[4]

IV

On the merits, the Seibers offer a number of theories as to why they are entitled to compensation for a temporary taking.

A

First, the Seibers contend that FWS's permit denial was a physical taking, arguing that they were denied the right to exclude others (*i.e.*, the spotted owls), which is the hallmark of a physical taking and that they are entitled to compensation under *Loretto*, 458 U.S. 419, for a temporary physical occupation.

The Supreme Court has long held that regulatory restrictions on the use of property do not constitute physical takings. *See, e.g., Tahoe-Sierra*, 535 U.S. at 303. Our court reiterated this understanding in *Boise Cascade*, a case directly on point, where we held that a prohibition against logging in protected owl habitat did not constitute a physical taking. 296 F.3d 1339. Contrary to the Seibers' contention, nothing in the Supreme Court's recent decision in *Brown v. Legal Foundation of Washington*, 538 U.S. 216 (2003), suggests that *Boise Cascade* was incorrectly decided.

In *Brown* the Supreme Court considered a takings challenge to the State of Washington's use of interest from lawyers' trust accounts ("IOLTA") to fund the state's legal aid programs. While the Court held that the IOLTA system did not constitute a compensable taking, it explained that "[a]

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[4] In holding that the denial was final, we do not address the government's contention, based on language in *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340, 352 n.8 (1986), that the Seibers' ITP application did not comply with federal law, and that its denial therefore could not have given rise to a taking.

law that requires . . . funds be transferred to a different owner for a legitimate public use . . . could be a *per se* taking requiring the payment of `just compensation.'"[5] *Id.* at 240. Even if this statement can be taken to mean, as the Seibers contend, that the government's authorization of third parties to utilize property may constitute a physical taking, it does not undermine our holding in *Boise Cascade*. The governmental protection of owls in *Boise Cascade*, as in our case, is not comparable to a government authorization to third parties to utilize property.

B

Second, the Seibers contend that the government is liable for a taking under the Supreme Court's decision in *Agins* because the logging bar did not serve a legitimate public purpose. We disagree.

In *Agins*, residential developers brought a takings claim against the city of Tiburon, California, when it re-zoned the appellants' property as suitable for single family dwellings exclusively. The appellants contended that the city had taken their property without just compensation because the new zoning ordinance completely destroyed the commercial value of their property. 447 U.S. at 258-59. The Supreme Court stated that "[t]he application of a general zoning law to particular property effects a taking if the ordinance does not substantially advance legitimate state interests, or denies an owner economically viable use of his land." *Id.* at 260 (citations omitted). The Court held the zoning ordinances did not constitute a taking, reasoning, first, that "the zoning ordinances substantially advance[d] legitimate governmental goals" and, second, that "[a]lthough the ordinances limit[ed]

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[5] The Court denied the appellants compensation "[b]ecause . . . the owner's pecuniary loss . . . is zero whenever the Washington law is obeyed—there has been no violation of the Just Compensation Clause of the Fifth Amendment in this case." *Brown*, 447 U.S. at 240.

development, they neither prevent[ed] the best use of the appellants' land, nor extinguish[ed] a fundamental attribute of ownership." *Id.* at 261-62 (citations omitted).

The government argues that the question of the legitimacy of the governmental interest does not provide a separate takings test under *Agins*. The Supreme Court has never found a compensable taking on the theory that the government acted without a legitimate interest, and the Court has declined to decide the continued viability of *Agins*. *Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 704 (1999) (declining to decide the "continued viability" of *Agins* because the issue was not preserved on appeal); *but see Tahoe-Sierra*, 535 U.S. at 333 (suggesting that the appellants could have pursued various alternative theories to support their takings claim, including an *Agins*-based theory that the government action "did not substantially advance a legitimate state interest"). Our court has held that "in a takings case we assume that the underlying governmental action was lawful." *Rith Energy, Inc. v. United States*, 270 F.3d 1347, 1352 (Fed. Cir. 2001) (refusing to consider the appellant's "assertions that the government's decisions in this case were driven by political pressure"). We need not decide, however, whether *Agins* presents a distinct takings test based on the lack of a legitimate governmental interest because, even if it did, it is indisputable in this case that the ESA and the ITP process serve a legitimate public purpose. *See generally Sweet Home*, 515 U.S. at 687; *Tenn. Valley Auth. v. Hill*, 437 U.S 153 (1978). The Seibers' allegation that there has been inequality in the FWS's enforcement of the ITP process, even if true, does not undermine the legitimacy of the underlying governmental interest.

C

Third, the Seibers argue that their permit denial constituted a categorical taking under the Supreme Court's theory in *Lucas* because it denied them "all economically beneficial or

productive use" of the forty acres at issue. *See Lucas*, 505 U.S. at 1015 (emphasis added). In *Lucas* the Supreme Court explained that despite the settled precedent to engage in "essentially ad hoc, factual inquiries" when evaluating takings claims, two categories of takings are "compensable without case-specific inquiry into the public interest advanced in support of the restraint": (1) where there has been a "physical invasion" of an owner's property and (2) "where [a] regulation denies all economically beneficial or productive use" of an owner's property. *Id.* The Supreme Court reasoned that the latter type of regulatory taking is effectively comparable to a physical taking, *id.* at 1017, and it held that the petitioner was per se entitled to compensation because the trial court concluded that the regulation rendered his property "valueless," *id.* at 1020-22.

Relying on language in *Tahoe-Sierra*, the government argues that there is no such legal category as a temporary categorical taking because by its very nature a temporary taking allows a property owner to recoup some measure of its property's value. *See Tahoe-Sierra*, 535 U.S. at 321. We note, however, that our case law suggests that a temporary categorical taking may be possible. In *Boise Cascade*, we explained that the Supreme Court may have only "rejected [the] application of the per se rule articulated in *Lucas* to temporary development moratoria," 296 F.3d at 1350, and not to temporary takings that result from the rescission of a permit requirement or denial, *id.* at 1351-52. We need not decide this issue because, even assuming that there can be a temporary categorical taking, such a thing did not occur here because the Seibers did not lose all value in their parcel as a whole.

Even in those "relatively rare situations" where the *Lucas* categorical rule applies, *Lucas*, 505 U.S. at 1018, the economic impact of the regulation must be assessed on the parcel as a whole. The Supreme Court has repeatedly

instructed that the impact of an alleged taking must be considered in terms of the "parcel as a whole," whether analyzed by categorical or ad hoc standards. *See Tahoe-Sierra*, 535 U.S. at 329-32 (holding that the *Lucas* per se rule only applies in the "extraordinary case" where three prerequisites are met: the regulation must (1) permanently deprive, (2) the *whole* property, (3) of all its value); *see also Penn Cent.*, 438 U.S. at 130; *Palm Beach Isles Assocs. v. United States*, 208 F.3d 1374, 1380, *aff'd on reh'g*, 231 F.3d 1354, *reh'g en banc denied*, 231 F.3d 1365 (Fed. Cir. 2000); *Loveladies Harbor, Inc. v. United States*, 28 F.3d 1171, 1179 (Fed. Cir. 1994); *Fla. Rock Indus., Inc. v. United States*, 791 F.2d 893, 904 (Fed. Cir. 1986) ("*Fla. Rock I*"). The "parcel as a whole" analysis is a federal requirement. In other words, there can only be a categorical regulatory taking if the *whole parcel* of land is deprived of all beneficial use.

Here, all parties agree that the forty acres of regulated land were part of a larger two hundred-acre parcel of land. There is no contention that a categorical taking resulted from the loss of "*all* economically beneficial or productive use" of the Seibers' entire two hundred-acre parcel. *See Lucas*, 505 U.S. at 1015 (emphasis added). Rather, the Seibers contend that each tree presents a separate property interest, and that they lost all economically beneficial or productive use of individual trees.

The Seibers argue that state law should determine whether individual trees constitute a separate property interest for purposes of the takings analysis.[6] State law, of course, plays

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[6] The Seibers rely on a comment in a footnote in *Lucas*, stating:

> [O]ur 'deprivation of all economically feasible use' rule . . . does not make clear the 'property interest' against which the loss of value is to be measured . . . . The answer to this difficult question may lie in how the owner's reasonable expectations have been shaped by the States' law of property—*i.e.*, whether and to what degree the State's law has accorded legal recognition and protection to the

an important role in takings jurisprudence. For example, it has a significant role in defining the property interests that may be afforded constitutional protection under the Takings Clause. *See Lucas*, 505 U.S. at 1031; *Phillips v. Wash. Legal Found.*, 524 U.S. 156, 164 (1998); *Maritrans Inc. v. United States*, 342 F.3d 1344, 1352 (Fed. Cir. 2003); *Conti v. United States*, 291 F.3d 1334, 1340 (Fed. Cir. 2002). State law is also pertinent to significant aspects of the regulatory takings analysis, such as determining the existence of a nuisance defense. *See Lucas*, 505 U.S. at 1031. However, state law does not determine how property interests are to be aggregated for purposes of identifying the parameters of the "parcel as a whole," whether that analysis is under *Lucas*, *Agins*, or *Penn Central*. Rather, the Supreme Court has made clear that whether something constitutes a separable property interest is a question to be determined by the federal law of takings considering the tradition in the historic common law. In *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470 (1987), where the petitioner challenged a state statute preventing certain mining as an unconstitutional taking, the Supreme Court rejected the petitioner's contention that the parameters of the property allegedly taken should be determined according to state law. *Id.* at 500; *see also Palm Beach*, 208 F.3d at 1380-81; *Forest Props., Inc. v. United States*, 177 F.3d 1360, 1365-66 (Fed. Cir. 1999); *Loveladies*, 28 F.3d at 1180-81. The Court reviewed prior takings decisions where it had considered what constituted a separate segment of property for Takings Clause purposes," and it concluded that the analysis should not "turn on whether state

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> particular interest in land with respect to which the claimant alleges a diminution in (or elimination of value). In any event, we avoid this difficulty in the present case . . . .

505 U.S. at 1016 n.7. We do not read this passage to suggest that the law of a particular state should govern the parcel as a whole analysis.

law allowed the separate sale of the segment of property." *Keystone*, 480 U.S. at 500.

No authority has been brought to our attention that holds as a matter of federal takings law that trees are a separate property interest before they are severed from their underlying land.[7] We need not, however, reach this question. As the Court of Federal Claims explained, even if trees are a separate property interest from the underlying ground, we must consider the timber as a whole. The Seibers have never alleged that their timber on the entire two hundred-acre parcel was rendered valueless. We reject the Seibers' categorical takings claim under *Lucas* because the ITP denial did not deprive the Seibers' of all economically viable use of the timber on the two hundred-acre parcel.

D

Finally, the Seibers contend that there has been a regulatory taking under the *Penn Central* standard. Again we disagree.

In *Penn Central*, the Supreme Court outlined the relevant factors to be considered in the regulatory takings analysis: (1) "[t]he economic impact of the regulation on the claimant"; (2) "the extent to which the regulation has interfered with distinct investment backed expectations"; and (3) "the character of the governmental action." *Penn Cent.*, 438 U.S. at 124. The Supreme Court, as well as our own court, has repeatedly held

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[7] Indeed, even the recent Oregon case law cited by the Seibers does not support the contention that each tree constitutes a separate property interest for purposes of determining the parameters of the parcel as a whole. These cases, including *Coast Range Conifers, LLC v. State*, 76 P.3d 1148 (Or. App. 2003), *Boise Cascade Corp. v. Bd. of Forestry*, 935 P.2d 411 (Or. 1997), and *Boise Cascade Corp. v. Bd. of Forestry*, 886 P.2d 1033 (Or. App. 1994), reject the application of the parcel as a whole rule to the takings analysis under Oregon's constitution. *See Coast Range Conifers*, 76 P.3d at 1156-58.

that this *Penn Central* "essentially ad hoc" examination of a number of factors governs regulatory takings cases where, as here, there has not been a categorical taking. *Tahoe-Sierra*, 535 U.S. at 326; *see also Lucas*, 505 U.S. at 1015; *Loretto*, 458 U.S. at 426; *Cooley*, 324 F.3d at 1306; *Boise*, 296 F.3d at 1350; Fla. Rock I, 791 F.2d at 900-901. These factors are considered in terms of the "parcel as a whole." *Penn Cent.*, 438 U.S. at 130-31.

The existence of economic injury is indispensable to demonstrating a regulatory taking. *See Hendler v. United States*, 175 F.3d 1374, 1385 (Fed. Cir. 1999) ("A pivotal criterion governing whether a regulatory taking has occurred is the impact the regulatory imposition has had on the economic use, and hence value, of the property . . . if the regulatory action is not shown to have had a negative economic impact on the property, there is no regulatory taking."); *see also Fla. Rock Indus., Inc. v. United States*, 18 F.3d 1560, 1571 (Fed. Cir. 1994) ("*Fla. Rock II*"). The Court of Federal Claims found insufficient economic injury to the parcel as a whole, implying that there could be no temporary taking unless there was a complete loss.[8] The Seibers argue

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[8] The Court of Federal Claims stated:

> [P]laintiffs cannot assert that they lost value on their property as this was an alleged temporary taking that has ended . . . At the same time, the alleged taking apparently did not affect plaintiffs' property as a whole, as they were able to log 15 acres and were planning before the permit requirement was lifted to log 25 more acres on other areas of their property. Thus, even if the plaintiffs were able to prove that the 40 acres were taken, it would not have been a compensable taking because plaintiffs' property interest as a whole was not impacted to the extent required . . . . Ultimately, plaintiffs' property was not rendered valueless by the permitting process regulations because now that the permit requirement is lifted, the timber is able to be logged, and the property has thus regained its value.

Seiber, 53 Fed. Cl. at 579.

that a taking need not be complete to be compensable. We agree that a partial temporary taking may be compensable. *See Palazzolo*, 533 U.S. at 619; *Cienega Gardens v. United States*, 331 F.3d 1319, 1343 (Fed. Cir. 2003); *McKay v. United States*, 199 F.3d 1376, 1383 (Fed. Cir. 1999); *Creppel v. United States*, 41 F.3d 627, 631 (Fed. Cir. 1994); *Fla. Rock II*, 18 F.3d at 1570. We find, nonetheless, that the Court of Federal Claims properly granted the government summary judgment on this issue because there has been no showing of economic injury caused by the temporary taking.

As mentioned above, the period of the alleged temporary taking, November 9, 2000-June 3, 2002, is the relevant period for purposes of assessing the economic impact to the Seibers' parcel as a whole, constituting the timber on the entire two hundred-acre parcel. Although the Seibers argue on appeal that the forty-acre portion of that timber decreased in value and suffered from root rot during the temporary takings period, they did not provide any evidence on summary judgment of economic loss during that period. The only-affidavit submitted to rebut the government s motion for summary judgment was that of Marsha Seiber, and, at most, it supported a permanent takings claim. This affidavit's discussion of economic impact is limited to the following statement: "The subject timber that we desire to log has no economic productive use or value unless harvested . . . . The FWS's action in denying us the right to log the subject timber has denied us all economic productive use of that property." (J.A. at 38.) The Seibers' alleged inability to harvest, however, was reversed on June 3, 2002, and Marsha Seiber's affidavit did not describe any economic impact imposed by the alleged temporary taking. The Seibers' counsel admitted as much at oral argument in our court, stating that the Seibers had "not specifically [addressed the economic impact] as to

the two year delay."[9] Our court has repeatedly made clear that the failure to provide evidence to support the existence of economic injury is fatal to a takings claim. In *Forest Properties*, a case where the appellant challenged a permit denial to fill wetlands as an uncompensated regulatory taking, we explained that the "economic impact of the regulation upon the claimant is measured by the change, if any, in the fair market value caused by the regulatory imposition." 177 F.3d at 1367 (quotations omitted). We held that there was insufficient economic impact to constitute a taking under the *Penn Central* test because the appellant had "failed to introduce convincing evidence to show the amount, if any, by which the value of the relevant property . . . was reduced by the denial of the permit." *Id.*; *see also Maritrans*, 342 F.3d at 1358 ("When considering *Penn Central's* economic impact factor, a court must 'compare the value that has been taken from the property with the value that remains in the property.'" (quoting *Keystone*, 480 U.S. at 497)); *Fla. Rock II*, 18 F.3d at 1567. The Seibers' temporary takings claim

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[9] The following exchange occurred at oral argument in our court:

> THE COURT: Did you address the economic impact of the temporary taking, that is the alleged temporary taking, the two-year delay?
>
> COUNSEL FOR APPELLANTS: No because we addressed the economic impact originally under the permanent taking claim. Once they changed their mind the day before the hearing, no we did not.

Even if we were to also consider the affidavit of David Cox, which was not included in the appendix on appeal and was not part of the record on the government's motion for summary judgment, it merely suggested that blowdowns affected the timber between 1998-2000 and that the trees continued to be plagued by root rot. Aff. of David R. Cox, Pls.' Reply in Supp. of the Cross-Mot. for Partial Summ. J. on the Issue of Liability, *Seiber v. United States*, No. 01-0333 (Fed. Cl. Mar. 11, 2002) ("Cox affidavit"). The Cox affidavit made no effort to identify the Seibers' loss from the inability to log during the relevant period, November 9, 2000-June 3, 2002.

also fails under the *Penn Central* test because they "failed to introduce convincing evidence to show the amount, if any, by which the value of the relevant property . . . was reduced" by the alleged temporary taking. *See Forest Props.*, 177 F.3d at 1367.

CONCLUSION

For the foregoing reasons, we affirm the Court of Federal Claims' grant of summary judgment in favor of the government.

AFFIRMED

COSTS

No costs.

APPENDIX C

IN THE UNITED STATES COURT
OF FEDERAL CLAIMS

[Filed SEP 6 2002]

No. 01-432 L

MARSHA SEIBER and ALVIN SEIBER,

v.

THE UNITED STATES,

JUDGMENT

Pursuant to the court's Published Opinion, filed September 4, 2002, granting defendant's motion for summary judgment as to all Counts, and denying plaintiffs' cross-motion for partial summary judgment,

IT IS ORDERED AND ADJUDGED this date, pursuant to Rule 58, that the complaint is dismissed. Costs for defendant.

Margaret M. Earnest
Clerk of Court

September 6, 2002

By: /s/ [Ineligible]
Deputy Clerk

NOTE: As to appeal, 60 days from this date, see RCFC 58.1, re number of copies and listing of all plaintiffs. Filing fee is $105.00.

APPENDIX D

IN THE UNITED STATES COURT
OF FEDERAL CLAIMS

[Filed September 4, 2002]

No. 01-432L

MARSHA SEIBER and ALVIN SEIBER,

Plaintiffs,

v.

THE UNITED STATES,

Defendant.

Takings; permanent and temporary takings; incidental take permit; Endangered Species Act.

Phillip D. Chadsey, Stoel Rives LLP, Portland, Oregon, for plaintiffs.

Dorothy R. Burakreis, General Litigation Section, Environmental and Natural Resources Division, U.S. Department of Justice, Washington, D.C., and *Diane Hoobler*, Office of the Solicitor General, U.S. Department of the Interior, of counsel, for defendant.

OPINION

MARGOLIS, *Senior Judge*.

This takings action is before the Court on defendant's motion to dismiss or, alternatively, for summary judgment, and on plaintiffs' cross-motion for partial summary judgment on the issue of liability. After carefully considering the parties' motions and after a hearing in court, defendant's motion

for summary judgment is granted as to all Counts. Plaintiffs' cross-motion for partial summary judgment is denied.

FACTS

Plaintiffs, Marsha and Alvin Seiber, own approximately 200 acres of land in Linn County, Oregon, on which they both live and conduct their logging business. Of this property, 185 to 190 acres are commercial timberlands. Forty acres of those commercial timberlands were designated by Oregon as northern spotted owl nesting habitat from 1994 to June 2002 and were thus protected from harvesting. Because the 40 acres were designated northern spotted owl nesting habitat by Oregon, the United States government, acting through the U.S. Fish and Wildlife Service (FWS), denied plaintiffs' application for a permit to cut timber on the property. As a result, plaintiffs claim that those 40 acres of timber were temporarily taken by the government, requiring just compensation pursuant to takings theories under *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992); *Agins v. City of Tiburon*, 447 U.S. 255 (1980); and, *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978).

In June 1990, FWS designated the northern spotted owl a threatened species under the Endangered Species Act. Endangered and Threatened Wildlife and Plants; Determination of Threatened Status for the Northern Spotted Owl, 55 Fed. Reg. 26,114 (June 26, 1990). Pursuant to this designation, the Oregon Department of Forestry (ODF) implemented state regulations aimed at protecting northern spotted owl nesting sites. The ODF regulations prohibited logging within a 70-acre area of a northern spotted owl nesting site. In 1994, Oregon designated a 70-acre area, 40 acres of which were on plaintiffs' property, as northern spotted owl nesting habitat. The remaining 30 acres are on plaintiffs' neighbors' property.

In February 1998, plaintiffs submitted a logging application to ODF seeking approval to harvest the 40-acre protected area. Under Oregon law, parties conducting commercial harvests in Oregon must file a notification with ODF announcing their intent to harvest the timber. *See generally*, ORS § 527.670 (1994). ODF refused to approve plaintiffs' harvesting plan, and on appeal the Oregon Board of Forestry affirmed the denial. The Oregon regulation protecting northern spotted owl nesting sites, however, contains an exception that permits logging of the protected sites, *i.e.*, the landowner acquires an incidental take permit for northern spotted owls from FWS.[1] The Endangered Species Act provides a detailed process by which a person may obtain a permit to engage in the incidental take of a protected species.[2] 16 U.S.C. § 1539(a). Thus, plaintiffs applied to FWS for an incidental take permit.

On November 26, 1999, plaintiffs submitted to FWS an incidental take permit application along with a habitat conservation plan, as required by the Endangered Species Act, 16 U.S.C. § 1539(a)(2)(A).[3] The application requested authoriza-

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[1] Under the Endangered Species Act, the "take" of an endangered species is prohibited unless authorized by regulation or permit. 16 U.S.C. § 1538(a)(1)(B). "Take" is defined under the Endangered Species Act as "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." 16 U.S.C. § 1532(19). "Harm" in the definition of "take" means any act which actually kills or injures protected wildlife and "may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering." 50 C.F.R. § 17.3.

[2] Incidental take of a species means "any taking otherwise prohibited, if such taking is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity." 50 C.F.R. § 17.3.

[3] The Endangered Species Act, 16 U.S.C. § 1539(a)(2)(A), requires that an incidental take permit applicant submit a habitat conservation plan, which specifies among other things the impacts likely to result from a

tion to take the northern spotted owl by logging 40 acres of a 70-acre area designated by Oregon as a spotted owl core area, *i.e.*, protected habitat. Plaintiffs expected that their habitat conservation plan would be considered a low-effect habitat conservation plan and as such processed within three months. FWS, however, determined that the habitat conservation plan was not low effect and thus required an Environmental Assessment, which results in a longer processing period.

In a February 7, 2000 letter, the Department of the Interior's Regional Solicitor informed plaintiffs that their incidental take permit application lacked much of the "biological analysis and information routinely provided by other applicants." Def's App. at 125. The Solicitor stated that FWS was willing to work with plaintiffs to discuss incidental take permit application modifications that would allow for expedited processing. In a February 9, 2000 response to the Regional Solicitor, plaintiffs' attorney stated that plaintiffs had no desire to discuss modifications to their incidental take permit application.

FWS denied plaintiffs' application in a July 6, 2000 letter. The letter stated that the Oregon Forest Practices Act regulations, upon which the habitat conservation plan solely relied, are not a sound biological rationale for mitigating and minimizing spotted owl take. With respect to the first mitigation measure in plaintiffs' habitat conservation plan, FWS stated that harvesting outside of the nesting season may minimize harm to currently nesting owls, but did not minimize or mitigate the incidental take resulting from removal of owl nesting habitat. In addition, FWS stated that plaintiffs' proposed alternative did not provide replacement habitat, nor did it provide dispersal habitat, which would allow owls to

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taking, as well as the measures the applicant plans to take in order to minimize and mitigate those impacts.

migrate through the area in the process of locating mates and nesting sites. FWS ultimately determined that

> [t]he net result is that there is essentially no mitigation being provided for the incidental take of spotted owls associated with the harvest of suitable habitat within close proximity to a nesting location. The incidental take would be either in the form of abandonment of the nest site, thus precluding future breeding, or loss of foraging and roosting opportunities which would decrease the likelihood for spotted owls to survive and successfully reproduce in the area.

Id. at 135.

FWS stated that although the application was denied there were other approvable alternatives available. It provided examples of two habitat conservation plans from similarly situated landowners that resulted in issuance of incidental take permits and suggested alternatives under which FWS believed plaintiffs would be issued an incidental take permit. The alternatives, which FWS noted were not comprehensive, were described in full in the July 6, 2000 letter and summarized in a September 28, 2001 letter: 1) selective harvest of the 40 acres to maintain spotted owl habitat; 2) harvest that eliminates suitable habitat for a period of time, but with a commitment to regenerate and maintain some level of suitable habitat in the future; 3) harvest alternatives that manage the entire property as a unit; and 4) harvest alternatives only outside the 40 identified acres, with the 40 acres serving as mitigation. In each letter that FWS sent to plaintiffs' attorney, FWS reiterated its offer of assistance in helping plaintiffs find a suitable and approvable alternative.

On July 28, 2000, plaintiffs requested reconsideration of the application denial. Reconsideration was denied, and plaintiffs appealed to the Regional Director of FWS. The appeal was denied on November 9, 2000. Plaintiffs then brought suit in this Court. Pursuant to this Court's direction,

FWS visited plaintiffs' property in order to evaluate changes that had occurred on the property since plaintiffs originally submitted their incidental take permit application. Following the visit and upon noting several changes, FWS sent a June 3, 2002 letter to plaintiffs' attorney, stating that an incidental take permit is no longer required to log the property. Plaintiffs subsequently informed this Court at oral argument that despite the fact that the permit is no longer required, plaintiffs still consider their four claims valid, *i.e.*, that they are now asserting temporary takings claims rather than permanent takings claims.

DISCUSSION

Plaintiffs moved for summary judgment on Counts 1 and 2 of the complaint. Summary judgment is appropriate when there are no disputed genuine issues of material fact and the moving party is entitled to judgment as a matter of law. RCFC 56; *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986). A fact is material if it might significantly affect the outcome of the suit under the governing law. *Anderson*, 477 U.S. at 248.

Defendant moved for dismissal of Counts 1, 2, and 3 for failure to state a claim under RCFC 12(b)(4) or, in the alternative, for summary judgment under RCFC 56 on all Counts. Dismissal under RCFC 12(b)(4) occurs when the facts, as asserted by the claimant, do not entitle him to a remedy under the law. *Spehr v. United States*, 51 Fed. Cl. 69, 91 (2001). However, a motion to dismiss for failure to state a claim shall be treated as one for summary judgment if matters outside the pleadings are presented to and not excluded by the court. RCFC 12(b). Thus, because outside pleadings were presented and not excluded by this Court, defendant's motion to dismiss shall be treated as an RCFC 56 motion for summary judgment.

The Fifth Amendment provides, in pertinent part, that private property shall not be taken for public use, without just compensation. U.S. Const. amend. V. There are generally three types of takings: "a permanent physical occupation, a physical invasion short of an occupation, and a regulation that merely restricts the use of property." *Loretto v. Teleprompter Manhattan, CATV Corp.*, 458 U.S. 419, 430 (1982). In order to prevail on a taking claim, the claimant must first establish a valid property interest in the property affected by the governmental action. *Boise Cascade Corp. v. United States*, No. 01-5106, 2002 U.S. App. LEXIS 14539, at *8 (Fed. Cir. July 19, 2002).[4] Once the claimant has proven a valid property interest, he or she must then show that the government action at issue constituted a taking of that interest. *Id.* Because the government does not contest that plaintiffs possess a property interest in both its fee simple estate and in ownership of the timber growing on the property, this Court may proceed to the issue of whether the government s action constituted a taking. *See id.*

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[4] *Boise Cascade Corp. v. United States* is a similar case to the one at hand. In that case, plaintiff was enjoined by a district court from logging certain property without an incidental take permit from FWS. *Boise Cascade Corp.*, 2002 U.S. App. LEXIS 14539, at *4. Plaintiff applied for an incidental take permit, but before a decision was rendered, FWS lifted the permit requirement from the property. *Id.* at *5. Plaintiff then brought suit in the United States Court of Federal Claims alleging a temporary taking of its merchantable timber due to the district court's injunction based on the same four theories asserted in this case. *Id.* The Court of Federal Claims held that the takings claim was not ripe because plaintiff had not been denied a permit, but was merely enjoined from logging without one. *Id.* at *6-7. The Court of Federal Claims also denied plaintiff's *Loretto*, claim because there was no forced governmental intrusion and thus no physical taking. *Id.* at *7. Upon appeal, the United States Court of Appeals for the Federal Circuit affirmed the lower court's decision in its' entirety. *Id.* at *50.

1. Ripeness of Plaintiffs' Claims

Courts may only address issues that are ripe for decision. *See generally Cristina Inv. Corp. v. United States*, 40 Fed. Cl. 571, 578 (1998). Where the issue is not ripe, the court lacks jurisdiction to hear the issue. *See Loveladies Harbor, Inc. v. United States*, 15 Cl. Ct. 381, 385 (1988). In this Court, "[a]ll that is necessary to ripen a federal takings challenge of this kind is a final decision from the government . . . ." *Id.* The party asserting jurisdiction has the burden of demonstrating that jurisdiction exists, and the Court may consider relevant evidence in order to resolve the jurisdictional dispute. *Reynolds v. Army & Air Force Exch. Serv.*, 846 F.2d 746, 747-48 (Fed. Cir. 1988).

Defendant originally based its motion in part on an assertion that the case was unripe, thereby precluding this Court's jurisdiction to hear the case. Defendant asserts that because the agency had not issued a final decision with respect to a permit grant or denial, plaintiffs' claim was not ripe. While plaintiffs' takings claim has changed from one of a permanent taking to a temporary taking in light 'of FWS's letter indicating that an incidental take permit is no longer required to log plaintiffs' property, the ripeness issue continues to directly affect plaintiffs' claim. The Federal Circuit recently held that a taking does not ripen until a permit is applied for and denied. *Boise Cascade Corp.*, 2002 U.S. App. LEXIS 14539, at *33. "If the government denies a permit, then the aggrieved party can seek compensation." *Id.* at *20. Further, if the government subsequently reconsiders the denial and grants the permit or revokes the permit requirement, the aggrieved party can seek compensation for a temporary taking. *Id.*

The holdings in *Boise Cascade* hinge on the assumption for a claim to be ripe, that a permit denial must be a final agency decision. A regulatory takings claim is not ripe until the agency implementing the regulations has reached a final decision regarding application of the regulations to the prop-

erty at issue. *Williamson County Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 186 (1985). "Such a decision generally will not be considered final if the government has the discretion to consider a modified plan, but the applicant has not asked the government to exercise that discretion." *Christina Inv. Corp.*, 40 Fed. Cl. at 579. In the present case, the plaintiffs submitted an application for an incidental take permit. FWS denied the permit based on its finding that plaintiffs' proposed minimization and mitigation efforts were inadequate to protect the northern spotted owl. FWS stated in its July 6, 2000 letter that although the permit was denied, several approvable alternatives were available. In addition, FWS included examples of two applications that were approved for permits, outlined specific criteria under which FWS felt a permit would be issued to plaintiffs, and offered assistance in creating an approvable permit application on numerous occasions. Thus, because FWS had the discretion and an indicated willingness to consider a modified plan, but plaintiffs did not ask the government to exercise that discretion, the initial permit denial was not a final decision by FWS with respect to application of logging regulations to plaintiffs' property. Plaintiffs' temporary takings claim based on permit denial is therefore unripe, and this Court lacks jurisdiction to entertain the claim.

2. Physical Takings Claim Under the *Loretto* Case

Even if plaintiffs' claims were ripe, plaintiffs would not prevail on the merits. Count 1 of plaintiffs' claim for relief asserts a physical taking by imposition of a servitude upon the property requiring that the merchantable timber be left standing. As such, plaintiffs rely on *Loretto*, which established the law with respect to a permanent physical occupation of private property by the government. *Loretto*, 458 U.S. at 421. In that case, the United States Supreme Court distinguished between the three types of takings. *See generally id.* at 426-38. The Supreme Court specifically affirmed

the traditional rule that a permanent physical occupation of property is a taking. *Id.* at 441. In so holding, the Supreme Court was not questioning "the equally substantial authority upholding a State's broad power to impose appropriate restrictions upon an owner's use of his property." *Id.* The *Loretto* decision is quite narrow and applies only to permanent physical occupations by the government. *Boise Cascade Corp.*, 2002 U.S. App. LEXIS 14539, at *37.

The Supreme Court described physical property rights as the rights "to possess, use and dispose" of property. *Loretto*, 458 U.S. at 435. It further stated that "[t]o the extent that the government permanently occupies physical property, it effectively destroys each of these rights." *Id.* Accordingly, where a permanent physical taking takes place, the property owner is deprived -of both his right to possess the occupied space himself as well as his right to exclude the occupier from possession and use of the property. *Id.* A permanent physical occupation also "forever denies the owner any power to control the use of the property." *Id.* at 436. Finally, although the owner may technically retain the right to sell or transfer the property, this right is essentially rendered void of any value as the future owner will also be deprived of the ability to make any use of the property. *Id.* A physical occupation is a permanent and exclusive occupation by the government that destroys all three of those rights. *Boise Cascade Corp.*, 2002 U.S. App. LEXIS 14539, at *37-38.

In its recent decision in *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, No. 00-1167, 2002 WL 654431 (U.S. Apr. 23, 2002), the Supreme Court reiterated the distinction between a physical taking and a regulatory taking, stating that a physical taking "gives the government possession of the property, the .right to admit and exclude others, and the right to use it for a public purpose."

Id. at *11 n.19.[5] The Supreme Court contrasted a regulatory taking as a taking that "does not give the government any right to use the property, nor does it dispossess the owner or affect her right to exclude others." *Id.* The Supreme Court also stated that this longstanding distinction makes it inappropriate to treat cases addressing physical takings as controlling precedents for regulatory takings cases and vice versa. *Id.* at *11.

Plaintiffs allege that the government's physical occupation of their property constitutes a taking under *Loretto*. In support of their argument, plaintiffs state that the government's actions permit occupation of the property by the northern spotted owl and deny plaintiffs the right to exclude the northern spotted owl. However, this argument does not satisfy the standard laid out in *Loretto*, and was recently rejected by the United States Court of Appeals for the Federal Circuit. *Boise Cascade Corp.*, 2002 U.S. App. LEXIS 14539, at *39, 41. First, plaintiffs fail to show how their cohabitation with the northern spotted owl deprives them of their right to possess the property themselves or how they are prevented from excluding others. Second, plaintiffs do not claim that the government's alleged occupation "forever denies [plaintiffs] any power to control the use of the property . . . ." *Loretto*, 458 U.S. at 436. Rather, plaintiffs state only that the government is preventing them from logging the property, but do not assert that they are prevented from otherwise controlling their property and using it for other means. However, plaintiffs

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[5] In *Tahoe-Sierra*, 2002 WL 654431, at *10, the Supreme Court distinguished between a general physical taking and a regulatory taking for purposes of its decision. However, that distinction does not replace the more detailed analysis required by the Supreme Court under *Loretto*. The Supreme Court in *Loretto* went further in its discussion and distinguished between a mere physical taking that falls short of a physical occupation and a permanent physical occupation, which require different tests. *Loretto*, 458 U.S. at 430.

have been harvesting other sections of their property throughout this process. June 6, 2002 Tr. at 20. Third, plaintiffs do not claim that the government has permanently deprived them of the right to dispose of the property or that the government's action has emptied that right of any value. *See id.* The facts asserted by plaintiffs do not entitle them to a remedy under *Loretto*. Plaintiffs, therefore, have failed to state a permanent physical taking claim.

3. Regulatory Taking Claim Under the *Lucas* Case

In its regulatory takings jurisprudence, the Supreme Court has generally avoided establishing a set formula for determining when a regulation has gone too far, instead preferring to engage in *ad hoc*, factual inquiries. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015 (1992); *Tahoe-Sierra*, 2002 WL 654431, at *12. However, there are two types of regulatory actions that the Supreme Court deemed compensable without .case-specific inquiry into the public interest advanced in support of the regulation: physical invasions of property and "the relatively rare situations where the government has deprived a landowner of all economically beneficial" or productive use of the land. *Lucas*, 505 U.S. at 1015-16, 1018. "[W]hen the owner of real property has been called upon to sacrifice all economically beneficial uses in the name of the common good, that is, to leave his property economically idle, he has suffered a taking." *Id.* at 1019.

In order to analyze whether the property is taken by a government regulation, a court must first determine what property interest is at stake. *M & J Coal Co. v. United States*, 47 F.3d 1148, 1154 (Fed. Cir. 1995) (establishing a two-part test for analyzing regulatory takings). To do so, the court may need to assess "how the owner's reasonable expectations have been shaped by the State's law of property—*i.e.*, whether and to what degree the State's law has accorded legal recognition and protection to the particular interest in land . . . ." *Lucas*, 505 U.S. at 1016 n.7. If a property interest is established, then

the court may determine whether the government action resulted in a compensable taking of that interest. *M & J Coal Co.*, 47 F.3d at 1154.

Plaintiffs claim that the government prevented them from logging 40 acres of their property during the period in which plaintiffs were attempting to obtain an incidental take permit, thereby effecting a temporary taking of their property. Plaintiffs assert that this was a categorical taking under *Lucas* because under Oregon law the 40 acres are a property interest separate and distinct from the remaining 160 acres they own. As such, they state that because the 40 acres are a separate property interest and because the government temporarily precluded them from logging any part of that 40 acres, thereby allegedly depriving them of all economically beneficial or productive use of that land, a *Lucas* taking occurred.

Under Oregon law, plaintiffs' timber may be considered a property interest separate from the land on which the timber grows. *Cf. Hawkins v. City of La Grande*, 843 P.2d 400, 407 (Or. 1992) (holding that destroyed crops, although growing from land, are a separate entity). However, for plaintiffs to prevail on a taking claim under *Lucas*, this Court must find that the 40 acres of timber are a property interest separate from the remaining 145-150 acres of commercial timberland. In determining whether this claim was properly asserted, this Court can look to the pleadings and admissions on file. *See* RCFC 12(b), 56(c).

There is no dispute over the fact that the 40 acres were originally designated protected northern spotted owl nesting habitat. However, in light of plaintiffs' statements in court, those 40 acres did not contain the only merchantable timber on the property at the time. Plaintiffs recently harvested 15 acres on another portion of their property and are currently in the process of logging about 25 additional acres also on their property. June 6, 2002 Tr. at 20; June 3, 2002 FWS ltr. at 1. As a result, this Court finds that the 40 acres of timber, while

possibly a separate interest from the underlying land, are not a separate property interest apart from other acreage containing merchantable timber. Thus, because the 40 acres alleged to be taken were not 100% of the timber interest, and therefore, plaintiffs' land did not lose all economically viable or beneficial use of that interest, plaintiffs' *Lucas* claim fails.

4. Regulatory Taking Claim Under the *Agins* Case

Although this Court holds plaintiffs' temporary takings claim to be unripe, this Court will analyze that claim.[6] "Temporary takings are not different in kind from permanent takings." *Wyatt v. United States*, 271 F.3d 1090, 1097 n.6 (Fed. Cir. 2001) (citing *First English Evangelical Lutheran Church v. L.A. County. Calif.*, 482 U.S. 304, 321 (1987)). A temporary taking occurs when what would otherwise be a permanent taking is cut short. *Id.* "The essential element of a temporary taking is a finite start and end to the taking." *Id.*

In conducting a regulatory taking analysis, the court must conduct "essentially ad hoc, factual inquiries." *Penn Cent. Transp. Co.*, 438 U.S. at 124. "[W]hether a landowner has been deprived of all economically viable use of his property is a predominantly factual question." *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 720 (1998). What that inquiry entails has not been delineated by the Supreme Court, but the Court has stated that regardless of the relevant factors, the parcel must be focused on as a whole. *Tahoe-Sierra*, 2002 WL 654431, at *12.

There are a number of factors that may be considered in evaluating whether a regulatory taking has occurred. A court should determine whether the regulation allegedly effecting a taking substantially advances a legitimate government interest

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[6] Plaintiffs informed this Court in a telephonic status conference that they abandoned their temporary taking claim under *Agins*, but then reasserted the claim at oral argument.

or denies an owner economically viable use of his land. *Agins*, 447 U.S. at 260. Courts have also considered the economic impact of the regulation on the property owners, the extent to which the regulation has interfered with the property owners' investment-backed expectations, the character of the government action, *Penn Cent.*, 438 U.S. at 124, and the length of delay in the regulatory process, *see Wyatt*, 217 F.3d at 1097-98; *Walcek v. United States*, 44 Fed. Cl. 462, 467 (1999).

Plaintiffs' original claim under *Agins* was that the government's refusal to grant plaintiffs an incidental take permit did not substantially advance a legitimate government interest and therefore constituted a taking. Plaintiffs assert that because the government designated only federal lands as "critical habitat" for the northern spotted owls, its denial of a permit on private property did not advance the government's interest in protecting the owl. The government points out that the final rule establishing critical habitat for the spotted owl stated that other areas not so designated may be important to owl conservation and may be addressed under other Endangered Species Act provisions. Endangered and Threatened Wildlife and Plants; Determination of Critical Habitat for the Northern Spotted Owl, 57 Fed. Reg. 1796 (Jan. 15, 1992). Regardless, plaintiffs do not assert that the government s interest in protecting the northern spotted owl is not legitimate. Plaintiffs also do not claim that the government's permit process does not substantially advance the legitimate interest in protecting the owl. Rather, plaintiffs claim that the interest in protecting the owl was not "sufficient to cause" the government to designate private lands as critical habitat.

Plaintiffs also claim under *Agins*, that they were denied economically viable use of their property throughout the permit process because their property was worthless during that time. However, according to the Supreme Court, "a fee simple estate cannot be rendered valueless by a temporary

prohibition on economic use, because the property will recover value as soon as the prohibition is lifted." *Tahoe-Sierra*, 2002 WL 654431, at *15. This statement does not mean that the full value must be recovered to avoid a taking; rather, some value must be recovered. As such, plaintiffs do not state a claim under *Agins*.

Additionally, at oral argument plaintiffs asserted a taking because timber prices have declined and some timber on their property lost value due to root rot. A temporary restriction that merely causes a diminution in value does not constitute a taking of the "parcel as a whole." *Tahoe-Sierra*, 2002 WL 654431, at *15. "Mere fluctuations in value during the process of governmental decisionmaking, absent extraordinary delay, are 'incidents of ownership. They cannot be considered as a 'taking' in the constitutional sense.'" *Agins*, 447 U.S. at 263 n.9 (quoting *Danforth v. United States*, 308 U.S. 271, 285 (1939)). Here, the loss in timber value is an incident of ownership and not a basis for a taking claim. Therefore, plaintiffs' assertion that their property was rendered temporarily worthless and that it lost value does not support their taking claim.

While plaintiffs did not allege in their complaint that the permit process resulted in a temporary taking, the Court will address that issue as plaintiffs raised it in oral argument. "A requirement that a person obtain a permit before engaging in a certain use of his or her property does not itself 'take' the property in any sense." *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 127 (1985). "[A] taking may occur by reason of 'extraordinary delay in governmental decisionmaking.'" *Wyatt*, 271 F.3d at 1098 (quoting *Tabb Lakes, Ltd. v. United States*, 10 F.3d 796, 803 (Fed. Cir. 1993)). However, "absent denial of the permit, only an extraordinary delay in the permitting process can give rise to a compensable taking." Boise Cascade Corp., 2002 U.S. App. LEXIS 14539, at *26. The length of the delay is often not the

primary factor. For a delay to be extraordinary, the delay must be substantial and is usually accompanied by a showing of bad faith. *Wyatt*, 271 F.3d at 1098. Where governmental agencies are implementing complex permitting schemes that require detailed information before issuance of a permit, the agencies should be afforded significant deference in determining what information is required to satisfy the permit process. *Id.* In addition, delay in the permitting -process may also be attributed to the applicant. *Id.*

Plaintiffs did not allege and have not presented any evidence of bad faith or negligence on the part of the government. Plaintiffs merely claim that the permit process took too long, and therefore a taking resulted. It is undisputed that the plaintiffs were unwilling to discuss their application and possible modifications with FWS during the permitting process. In light of the uncontroverted facts in this case and the absence of any showing of bad faith by the government, this Court finds that the permit process in this case did not constitute a temporary taking of plaintiffs' property.

5. Regulatory Taking Claim Under the *Penn Central* Case

Plaintiffs assert a regulatory taking claim under *Penn Central Transportation Co.*, 438 U.S. 104. In that case, the Supreme Court noted three factors that have particular significance in a regulatory takings analysis: 1) "[t]he economic impact of the regulation on the claimant," 2) "the extent to which the regulation has interfered with distinct investment-backed expectations," and 3) "the character of the governmental action." *Penn Cent.*, 438 U.S. at 124. Again, the focus must be on the "parcel as a whole." *Id.* at 130-31. Plaintiffs assert that the three factors are satisfied to the extent that a taking occurred in that 1) the economic impact on plaintiffs was the loss of "a couple hundred thousand dollars" by virtue of not being able to harvest the timber; 2) plaintiffs had a reasonable investment-backed expectation that they would be able to harvest the timber for their own use; and 3) the gov-

ernment "confiscated 40 acres of plaintiffs' timber for its own purposes." Pls' Reply at 18. Plaintiffs bolster their claim of adverse economic impact by claiming that they were "barred from deriving any income from a substantial portion of their land." *Id.* However, in light of the fact that the government no longer requires a permit to log the 40 acres, plaintiffs are now in a position to log the timber for an economic gain and realize their alleged investment-backed expectation. *See Tahoe-Sierra*, 2002 WL 654431, at *13. In addition, as plaintiffs note, they have been logging and deriving income from other portions of their property all along.

Likewise, plaintiffs cannot assert that they lost value on their property as this was an alleged temporary taking that has ended. That they were unable to realize income from the timber for a period of one year due to a reasonable permitting process is an incident of ownership. At the same time, the alleged taking apparently did not affect plaintiffs' property as a whole, as they were able to log 15 acres and were planning before the permit requirement was lifted to log 25 more on another area of their property. Thus, even if plaintiffs were able to prove that the 40 acres were taken, it would not have been a compensable taking because plaintiffs' property interest as a whole was not impacted to the extent required by *Agins* or *Penn Central*. Ultimately, plaintiffs' property was not rendered valueless by the permitting process regulations because now that the permit requirement is lifted, the timber is able to be logged, and the property has thus regained its value.

Finally, plaintiffs claim that they were singled out to bear the burden of protecting the northern spotted owl when the burden should have been borne by the public as a whole. In *Penn Central*, while the Supreme Court recognized that the Fifth Amendment guarantee was designed to prevent the government from forcing some people alone to bear public burdens, the Court upheld New York City's landmark and

historic district law that applied only to selected parcels. 438 U.S. at 123. The Court explained that unlike discriminatory zoning, which arbitrarily singles out a particular parcel for different, less favorable treatment from its neighbors, New York City's landmark law embodied a comprehensive plan designed to preserve landmarks and historical districts. *Id.* at 132. In addition, the Court pointed out that numerous properties had come under this plan. *Id.* In the instant case, the government created a similarly comprehensive plan, through the Endangered Species Act, designed to preserve and protect threatened species, including the northern spotted owl. As in *Penn Central*, several properties have come within the plan's restrictions. Thus, plaintiffs' property was not arbitrarily singled out, nor was plaintiffs' property the only parcel to have been affected by Endangered Species Act regulations. Therefore, plaintiffs are not individually bearing the burden imposed by the Endangered Species Act. Additionally, this Court considered plaintiffs' other arguments and finds them without merit.

CONCLUSION

For the foregoing reasons, this Court grants defendant's motion for summary judgment as to all Counts. Plaintiffs' cross-motion for partial summary judgment is denied. The Clerk shall dismiss the complaint. Costs for defendant.

/s/ Lawrence S. Margolis
LAWRENCE S. MARGOLIS
Senior Judge, U.S. Court of Federal Claims

September 4, 2002

APPENDIX E

[Logo]

UNITED STATES DEPARTMENT OF THE INTERIOR

FISH AND WILDLIFE SERVICE
Oregon Fish and Wildlife Office
2600 S.E. 98th Avenue, Suite 100
Portland, Oregon 97266
(503) 231-6179 FAX: (503) 231-6195

Reply to: 8539.4001(00)
TS Number: 02-5729

June 3, 2002

Phillip D. Chadsey
Stoel Rives
Standard Insurance Center
900 SW Fifth Avenue, Suite 2300
Portland, Oregon 97204-1268

Dear Mr. Chadsey:

At the court's direction, we have been working to develop alternatives for Alvin and Marsha Seiber to consider in the development of a habitat conservation plan (HCP) to address the possibility of incidental take of the northern spotted owl. We appreciated the opportunity to visit the Seiber's property on April 21, 2002, and talk with Marsha Seiber and Jerry Whaley, who assists with managing the property. The visit was helpful in evaluating the changes that had occurred to the property since the original incidental take permit application was received November 26, 1999, and since U.S. Fish and Wildlife Service (Service) representatives last visited the property on January 25, 2000. The site visit provided new information as to the current forest conditions.

As you know, the recent history of the Little Wiley Creek spotted owl site has shown that a pair was last observed in 1996.. There were no spotted owls observed during surveys in

1997-98, but a male was observed in the vicinity in 1999 and 2000. There were no observations of spotted owls in 2001 and in the two survey visits conducted this year there have been no detections.

Briefly, during our recent site visit we learned that a storm with high winds in early February 2002, had blown down or uprooted many trees in the 40 acre area at issue. Mrs. Seiber indicated that this storm event revealed a greater than previously recognized presence of laminated root rot, a fungal disease that affects the roots of certain tree species. Both healthy and diseased trees were subject to windthrow or partially uprooted. In some cases the falling of trees damaged or knocked down additional trees creating scattered openings. These openings may increase the risk of future windthrow. We also learned that the Seibers are in the process of cutting about 25 acres of timber southwest of the subject 40 acres and have recently completed harvesting about 15 acres, leaving little suitable habitat in that area.

This latest information on the extent of the root rot and the windthrow problems likey affects the ability of owls to utilize the area in the near future. The current openings due to these natural processes have degraded the habitat suitability of the stand for spotted owls. These openings also increase the possibility of future blowdown. In addition, the recent harvest by the Seibers has further limited the amount of interior forest conditions in the immediate vicinity of the 40 acres. The forest area surrounding the Little Wiley Creek spotted owl activity.center is highly fragmented and has continued to experience timber harvest.since the Seibers submitted their HCP. These new landscape conditions in and around the Little Wiley Creek activity center will likely discourage spotted owl nesting, though not necessarily preclude it.

One additional factor that can affect spotted owl use of the area is the presence of barred owls, which often displace spotted owls when they move into an area. Because spotted

owls and barred owls are closely related they consider each other as competitors for the same resources. In addition, barred owls are more aggressive than spotted owls and are most likely to prevail in any territorial dispute. The presence of individual barred owls in the vicinity of the Little Wiley Creek site has been documented for the past few years. However, recent survey on the evening of May 29, 2002, documented the presence of a pair of barred owls about one mile northwest of the Seiber property. Pairs of owls are generally more territorial than individuals, especially if they are engaged in nesting activities. No other owls were observed during this particular survey.

Considering this new information, especially the presence of a pair of barred owls, we believe that it is unlikely that spotted owls would continue to occupy the area. The reduction of forested area, the fragmentation of forest stands, and the newly discovered presence of a pair of barred owls would deter spotted owls from using the area. This, combined with the intermittent presence of an unpaired spotted owl, suggest that the area will no longer be likely to attract and maintain spotted owls. For these reasons, we believe. that the planned activities by the Seibers are not likely to result in a take of spotted owls under the Endangered Species Act at this time, and therefore a section 10 incidental take permit is no longer required.

If you have any questions, please contact Richard Szlemp at (503) 231-6179.

Sincerely,

/s/ Kemper M. McMaster
KEMPER M. MCMASTER
State Supervisor

cc. Dorothy R. Burakreis
Diane K. Hoobler

APPENDIX F

Phillip D. Chadsey
STOEL RIVES LLP
900 SW Fifth Avenue, Suite 2600
Portland, OR 972044268
Telephone: (503) 224-3380

Attorneys for Plaintiff

STATE OF OREGON)
) ss.
County of Linn)

UNITED STATES COURT OF FEDERAL CLAIMS

Civil No. 01-432-L

MARSHA SEIBER AND ALVIN SEIBER,
Plaintiffs,

v.

UNITED STATES OF AMERICA,
Defendant.

AFFIDAVIT OF MARSHA SEIBER
Before Senior Judge Lawrence S. Margolis

I, Marsha Seiber, being first duly sworn depose and say:

1. I am one of the plaintiffs in this action. My husband and I own approximately 200 acres of property in Linn County, which I inherited from my uncle in 1986. About 185 to 190 acres consists of commercial timberlands.

2. In August 1990, the Oregon State Forester (the "OSF") adopted an interim spotted owl policy precluding timber harvest within a 70-acre core area "of the best available

suitable' habitat in the vicinity of the [nest] site. " The Oregon State Board of Forestry (the "Board") subsequently adopted former OAR 629-24-809 [present OAR 629-665-0210], which requires protection of a 70-acre core area of suitable owl habitat encompassing the nest site.

That provision states in part:

> "(a) A 70 acre area of suitable spotted owl habitat encompassing the nest site, to be maintained as suitable spotted owl habitat;
>
> "* * * * *
>
> "(2) For the purposes of this rule, nesting site means and includes the tree, when known, containing a spotted owl nest; or when not specifically known, includes an activity center of a pair of adult spotted owls. An activity center is a location determined by the State forester to have been reliably identified as being *occupied* by an adult pair of spotted owls, capable of breeding." OAR 629-665-0210(1)(a), (2) (emphasis added).

3. My understanding is that the foregoing regulation was adopted as a direct result of the U.S. Fish and Wildlife Service ("FWS") having designated the northern spotted owl a "threatened species" under the federal Endangered Species Act in June 1990 and issued guidelines requiring the protection of a 70 acre parcel of timber around every spotted owl nesting site.

4. In 1994 we submitted an application to the Oregon State Forester ("OSF") to log some of our timber. At that time approximately 40 acres of merchantable timber (the "subject timber") was designated by the OSF to be spotted owl habitat and we were not allowed to log it.

5. In February 1998 we again advised the OSF of our desire to log the subject timber. The written logging plan we submitted stated that we would not conduct logging opera-

tions while spotted owls might be nesting in the area (March 1 to September 30), or until any young spotted owls had fledged, in order to avoid any incidental harm to them. Our logging plan was denied on the ground that it failed to describe how the operation would be conducted to provide a 70-acre core area of suitable habitat consistent with the requirements of OAR 629-665-0210(1)(a). We were un= willing to designate any of our timber for use as a public wildlife preserve for spotted owls.

6. We then appealed the OSF's denial of our logging plan to the Board of Forestry ("BOF") and on March 27, 1998 it entered a final order that affirmed the OSF's denial of our right to log the subject timber.

7. In order to try to obtain an exception under OAR 629-665-0210(5), my husband and I submitted an application to the FWS for an Incidental Take Permit ("ITP") for the owls that had nested in the core area, together with a Habitat Conservation Plan agreeing that we would adhere to all conservation measures required by the general provisions of the Oregon Forest Practices Act and regulations, if we were allowed to harvest the subject timber. The FWS denied us an ITP for the owls.

8. The subject timber that we desire to log has no economic productive use or value unless harvested. Nor can the approximately 40 acres of land on which the subject timber stands be put to any economic productive use unless the present crop of merchantable timber is harvested so that it can be replanted with a new crop of trees. The FWS' action in denying us the right to log the subject timber has denied us all economic productive use of that property.

9. Likewise, the FWS' action of requiring us to submit to having our timber occupied by spotted owls as a nesting site has denied us the right to exclude the owls from our property and our right to possess, use, and dispose of the subject

timber or otherwise make use of that property for our own purposes.

10. We then commenced this inverse condemnation action for the taking of our timber.

/s/ Marsha Seiber
MARSHA SEIBER

SUBSCRIBED AND SWORN to before me this 9th day of January, 2002.

/s/ Sally F. Pelham
SALLY F. PELHAM
Notary Public for Oregon

My Commission Expires: May 19, 2005

APPENDIX G

Phillip D. Chadsey
STOEL RIVES LLP
900 SW Fifth Avenue, Suite 2600
Portland, OR 972044268
Telephone: (503) 224-3380

Attorney for Plaintiffs

UNITED STATES COURT OF FEDERAL CLAIMS

[Filed Jul. 26, 2001]

Civil No. 01-432-L

MARSHA SEIBER AND ALVIN SEIBER,
Plaintiffs,

v.

UNITED STATES OF AMERICA,
Defendant.

COMPLAINT FOR JUST COMPENSATION FOR A TAKING OF PRIVATE PROPERTY FOR A PUBLIC PURPOSE AND DEMAND FOR A JURY TRIAL

Plaintiffs allege as follows:

Jurisdiction

1. This action arises under the laws of the United States including the Takings Clause of the Fifth Amendment to the U.S. Constitution and the Tucker Act, 28 U.S.C.A. § 1491 (West 1994 & Supp. 2001). Plaintiffs seek just compensation for a taking of merchantable timber that they have been prevented from logging as the result of the government's refusal to issue them an Incidental Take Permit ("ITP") pursuant to the Endangered Species Act (the "ESA"), 16 U.S.C.A. § 1531, *et seq.* (west 2000).

Parties and Venue

2. Plaintiffs are residents of the state of Oregon, where they own and live on a parcel of land that contains merchantable timber that is the subject of this action. The governmental action that prevented plaintiffs from logging their timber occurred in that state.

Statement of Facts

3. Plaintiffs are the owners of approximately 200 acres of land in Linn County, Oregon that contains merchantable timber that the government claims is occupied by a pair of northern spotted owls (*strix occidentalis caurina*) as a nesting site.

4. In 1990 the U.S. Fish and Wildlife Service (the "USF&WS") listed the northern spotted owl as a threatened species under the ESA. The USF&WS also issued "Incidental Take Guidelines" requiring that all property owners avoid harvesting core nesting areas, or "nest site/activity center[s]," which were defined as consisting of not less than 70 acres of suitable habitat used by young owls before the fledgling stage. The intent of the "Incidental Take Guidelines" was to protect such "nest site/activity center[s]" so that they could be occupied by a pair of northern spotted owls that would reproduce. Approximately 40 acres of plaintiffs' timber has been protected by the USF&WS as a "nest site/activity center."

5. In October 1991 the USF&WS rescinded the foregoing "Incidental Take Guidelines" because a federal court found that they had not been lawfully adopted. After those guidelines were rescinded, the Oregon Department of Forestry (the "ODF") continued to protect northern spotted owl nest sites through its own regulation, which also prohibited logging within a 70-acre area that included a nest site.

6. In 1995, the ODF informed plaintiffs that a pair of northern spotted owls ("Little Wiley Owls") were nesting in timber on land immediately to the north of their property. The ODF then designated approximately 40 acres (the "Subject Timber") as protected nesting habitat under state law.

7. In 1997, plaintiffs were informed by the ODF that the owls had not nested on the adjacent land during that year. On February 4, 1998, plaintiffs filed Notification No. 98-791-40082 giving notice to the ODF of their desire to log the Subject Timber. In, seeking to log the Subject Timber, plaintiffs indicated they were willing to not conduct logging operations while spotted owls might be nesting in the area (March 1 through September) or until the young spotted owls had fledged in order to avoid any incidental harm to them. Even though the owls had not nested in the area during 1997, plaintiffs' plan to log the Subject Timber was denied approval on February 19, 1998, based on Oregon Administrative Rule 629-665-0210(1), which required protection of the nesting site under state law, unless it obtained an ITP for the Little Wiley Creek Owls, pursuant to the requirements of the ESA.

8. To obtain a waiver pursuant to Oregon Administrative Rule 629-665-0210(5), plaintiffs then submitted an application for an ITP to the USF&WS, after preparing a Habitat Conservation Plan (the "HCP") as required by the ESA. The HCP described the same 40 acres of timber that the ODF had designated to protect the nesting habitat for the Little Wiley Owls. In the HCP plaintiffs agreed to abide by all conservation measures required by Oregon law if the USF&WS would grant an ITP that would allow them to harvest the timber in the protected nesting site. On November 9, 2000, the USFWS issued a Final Order signed by the regional director denying plaintiffs an ITP for the Little Wiley Owls,

even though since 1996 they had not nested in the designated core area that includes the Subject Timber.

CLAIM FOR RELIEF

COUNT ONE,
(*Loretto* Per Se Theory)

9. The government's refusal to issue plaintiffs an ITP has imposed a servitude upon their property requiring the merchantable timber to be left standing so it can be occupied as a northern spotted owl nesting site, which constitutes a taking of plaintiffs' timber for a public purpose, under the Takings Clause of the Fifth Amendment to the U.S. Constitution.

10. Because plaintiffs are prevented from making any economic use of their timber as a result of the government having denied them an ITP, plaintiffs have suffered a loss of logging the subject timber and has thus deprived plaintiffs of all economically productive use of that property, which constitutes a taking of plaintiffs' property for a public purpose that requires defendant to pay plaintiffs just compensation under the Takings Clause of the Fifth Amendment to the U.S. Constitution.

COUNT THREE,
(Agins Theory)

13. Plaintiffs reallege paragraphs 1 through 8 and 10 above.

14. When. the USF&WS listed the northern spotted owl as a threatened species it was required by the ESA to designate critical habitat for the recovery of the species. The USF&WS designated only lands owned by the federal government as critical habitat for the northern spotted owl, thus plaintiffs' timber and the property of other private timber owners was not deemed to be critical in order to provide sufficient habitat for the survival or recovery of the species.

15. Pursuant to Executive Order No. 12,630, 3 C.F.R. § 554 (1989), defendant was required to make a Takings Implication Assessment ("TIA") in conjunction with designating critical habitat for the northern spotted owl. As a part of that TIA, the USF&WS determined that because 100 percent of the critical habitat necessary to protect the species was under federal jurisdiction, the takings implication involving private property was insignificant. The USF&WS found that the only private property likely to be affected was property bordering on federal land designated as critical habitat and property on which it was necessary to obtain a right-of-way across those federal lands to gain access to log the property.

16. Plaintiffs' property does not border on federal lands that have been designated critical habitat, and plaintiffs do not require any right-of-way across federal lands to log the Subject Timber.

17. In its final designation of "critical habitat" for the northern spotted owl, defendant stated that all nonfederal lands were being excluded "because of the potential economic concerns and because their designation would provide little additional conservation benefit to the owls" 57 Fed. Reg. 1796, 1808 (1992).

18. When there is a substantial need to protect critical wildlife habitat on private lands, Congress has authorized defendant to use the power of eminent domain to acquire such property for a public purpose. Congress has determined that the burden of protecting threatened and endangered species is a public burden, which in all fairness and justice should be borne by the public as a whole.

19. Protecting habitat when there are no identifiable owls present to be harmed and when that habitat has not been designated critical to the survival of the species does not advance a legitimate governmental interest under the ESA.

The government's injunction constituted a temporary taking of plaintiffs' merchantable timber for a public purpose, which requires defendant to pay plaintiffs just compensation under the Takings Clause of the Fifth Amendment to the U.S. Constitution.

COUNT FOUR,
(*Penn Central*, Theory)

20. Plaintiffs reallege paragraphs 1 through 8, 10, and 14 through 19 above.

21. Plaintiffs have managed the timber on their land with the reasonable investment-backed expectation that they would be able to sell it to provide income during their retirement without having to delay the harvesting of their timber in order to provide habitat for a wildlife species that the government desires to protect.

22. Plaintiffs should not have been required to bear the burden of protecting the northern spotted owl nesting site on their property without compensation for the timber they Were prevented from harvesting, when in fairness and justice that burden of providing habitat for the species should be borne by the public as a whole.

23. The government's denial of an ITP has prevented plaintiffs from harvesting their timber and constitutes a taking of plaintiffs' property for a public purpose, which requires defendant to pay plaintiffs just compensation under the Takings Clause of the Fifth Amendment to the U.S. Constitution.

Wherefore, plaintiffs pray for damages against defendant in the amount of $306,000, together with interest from November 9, 2000; plaintiffs' reasonable attorney fees, pursuant to 42 U.S.C.A. § 4654(c) (West 1995); and costs.

DATED: July 25, 2001.

/s/ Phillip D. Chadsey
PHILLIP D. CHADSEY
Attorney for Plaintiff

Plaintiffs demand a jury trial pursuant to their rights under the Seventh Amendment to the U.S. Constitution.

/s/ Phillip D. Chadsey
PHILLIP D. CHADSEY
Attorney for Plaintiff

APPENDIX H

[LOGO]

UNITED STATES DEPARTMENT OF THE INTERIOR
FISH AND WILDLIFE SERVICE
911 NE. 11th Avenue
Portland, Oregon 97232-4181

[Filed Nov. 9, 2000]

Mr. Phillip D. Chadsey
Stoel Rives LLP
900 SW Fifth Avenue, Suite 2600
Portland, Oregon 97204-1268

Dear Mr. Chadsey:

This responds to your letter of September 26, 2000, transmitting an appeal by your clients, Alvin and Marsha Seiber, of our denial of their application for an incidental take permit under the Endangered Species Act (ESA).

In a July 6, 2000, letter from our Assistant Regional Director-Ecological Services, we explained that the proposed Wiley Creek Habitat Conservation Plan (HCP) for the 40-acre harvest on the Seiber property in Linn County, Oregon, did not meet the issuance criteria for an incidental take permit under section 10(a) of the ESA [16 U.S.C. Section 1539(a)]. Your July 28, 2000, letter requesting reconsideration of our denial did not present any new information and your request was subsequently denied in a September 12, 2000, letter from the Deputy Regional Director. As explained in our July 6 and September 12, 2000, letters, the proposed minimization and mitigation elements of the Wiley Creek HCP are not based on sound biology, are not commensurate with the anticipated impacts of take, and are not the maximum extent practicable. The Seibers' appeal of September 26, 2000, does not present new information or facts, but rather argues that the site should

be declared abandoned and that there is no evidence the planned logging will have an adverse effect on the threatened northern spotted owl.

As explained in the Deputy Regional Director's September 12, 2000, letter to you, we follow the 1992 "Protocol for Surveying Proposed Management Activities that May Impact Northern Spotted Owls," that we have formally endorsed, when considering whether a spotted owl site remains active. Surveys of the Wiley Creek site under this protocol recorded a spotted owl response in 1999, indicating that spotted owls are still likely to use the site. Using this protocol, this site may be considered inactive if there are three consecutive years in which no spotted owl responses are recorded in the area. A copy of the protocol and relevant survey data are enclosed.

The Seibers' appeal also states there is no evidence that logging the subject timber would have any adverse effect on an owl that may have been in the general area of the property in 1999. *See United States v. West Coast Forest Resources*, Civ. No. 96-1575-HO (W.D. Or. 2000). As stated in the Deputy Regional Director's letter to you, the Seibers requested a permit to authorize any take of the northern spotted owl incidental to logging 40 acres of forest on their property.

As explained .in our previous correspondence, logging 40 of 70 acres of a state-designated spotted owl core area would result in the removal of a significant portion of habitat that surrounds an activity center as determined using the above referenced protocol, and this habitat is some of the best available habitat near the activity center. The logging poses a risk of incidental take of the owls because of it's proximity to the activity center and the absence of adjacent or nearby habitat.

Spotted owls select nest sites based upon the availability of nesting, foraging, and roosting habitat The habitat surrounding

a nest site is generally utilized to a greater extent than habitat further from the nest site, even if the habitats are similar in quality. The proposed logging would likely discourage future use of the activity center because 40 acres of the best available habitat would be removed within close proximity of the spotted owl activity center located on adjacent property. Nest areas may also be selected based upon microclimate although this has not been conclusively documented. The proposed removal of 40 acres near the activity center may alter the microclimate such that nesting would be discouraged. if the spotted owls attempted to nest after the proposed logging, there would be less available habitat in which to roost or forage for themselves or their young, and less available habitat for fledglings to roost and feed. Fledglings cannot fly great distances and remain in the immediate vicinity of the nest site until strong enough to fly elsewhere. They are still dependent upon the adults for adequate food and are very vulnerable to predators and inclement weather at this time.

Section 3 of the ESA states that "'take' means to harm, harass, . . .". Under 50 CFR 17.3, "harm" as used in the definition of 'take' "means an act which actually kills or injures wildlife. Such act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering." We believe the proposed harvest may significantly impair spotted owl breeding, feeding, and sheltering for the above outlined reasons and, therefore, poses a risk of incidental take.

The Seibers' application for an ESA permit for their planned logging operation prudently recognizes the risk that their proposed logging may result in incidental take of the spotted owl. We agree with their assessment of this risk. However, in the absence of any new information or modification of their HCP proposal, we must continue to conclude that the mitigation and minimization measures in the Seibers' proposed

HCP do not meet the permit issuance criteria for an incidental take permit under the ESA. *See*, 16 U.S.C. Section 1539(a).

The Seibers have previously declined assistance from the Fish and Wildlife Service in developing their HCP application.. However, as we have indicated on a number of occasions, including in our July 6 and September 12, 2000, letters to you, we are available to provide technical assistance to the Seibers if they wish to develop an improved HCP.

If the Seibers would like our technical assistance, they should contact Katherine Hollar of this office at (503) 231-6241, or Richard Szlemp of our Oregon Fish and Wildlife Office at (503) 231-6179.

Sincerely,

/s/ Anne Badgley
ANNE BADGLEY
Regional Director

Enclosures

APPENDIX I

[LOGO]

UNITED STATES DEPARTMENT OF THE INTERIOR
FISH AND WILDLIFE SERVICE
911 NE. 11th Avenue
Portland, Oregon 97232-4181

[Filed Sep. 12, 2000]

Mr. Phillip D. Chadsey
Stoel Rives LLP
900 SW Fifth Avenue, Suite 2600
Portland, Oregon 97204-1268

Dear Mr. Chadsey:

This responds to your July 28, 2000, letter requesting reconsideration of our denial of an incidental take permit application submitted on behalf of Alvin and Marsha Seiber. Our Assistant Regional Director's July 6, 2000, letter to you explained that the proposed Wiley Creek Habitat Conservation Plan (HCP) for the 40-acre harvest on the Seiber property in Linn County, Oregon, did not meet the issuance criteria for an incidental take permit under the Endangered Species Act, 16 USC 1539 (a)(2)(B)(ii). The proposed minimization and mitigation elements of the Wiley Creek HCP are not based on sound biology, *are not* commensurate with the anticipated impacts of take, and are not the maximum extent practicable. Your July 28, 2000, letter does not present any new information or facts but did raise questions regarding the likelihood of incidental take.

The approximately 40-acre area proposed for logging has habitat features commonly used by northern spotted owls. The area is a naturally regenerated stand composed of a mixture of conifer and hardwood trees approximately 40 to 70 years old. There may be a few trees older than 70 years

present on the site. While this is a relatively young stand, spotted owls likely select this site in part because of the structure provided by its relatively significant hardwood component. The downed wood present provides an important habitat component for rodents, a main prey item for spotted owls. The relatively open understory facilitates foraging by spotted owls. The presence of laminated root rot has likely contributed to downed wood and the creation of snags, which are also important habitat components for spotted owl rodent prey items such as flying squirrels and woodrats.

The area proposed for harvest constitutes over half of a State of Oregon-designated 70-acre spotted owl core area. Core areas are selected to represent the best available habitat within the immediate vicinity of a nest site. The area immediately surrounding a spotted owl nest site usually contains important habitat components that provide spotted owls with foraging and roosting opportunities in addition to a nest site. The area immediately surrounding a nest site is also important for the fledging of young in that it provides a prey base to feed the young, structure for the young to initially disperse from the nest tee, and shelter from predators while being fed by the parents and roosting. This area would also likely supply the appropriate microclimate for the adults and young.

The "Protocol for Surveying Proposed Management Activities that May Impact Northern Spotted Owls," dated March 17, 1999, has been used to survey the surrounding area for spotted owls. This protocol is endorsed by the U.S. Fish and Wildlife Service. Based upon surveys conducted under this protocol, the vocal spotted owl response recorded in 1999 indicates that this spotted owl activity center is still considered active. This designation signifies that spotted owls are still likely to use the site. Using this protocol, this site may be considered inactive if there are three consecutive years in which no owl responses are recorded in the area. The State of Oregon also recognizes this survey protocol when

determining 70-acre spotted owl core areas. In addition, we note that data from the Oregon Department of Forestry and the proposed HCP indicate that the nest tree was occupied in 1996 rather than in 1994 as indicated in your July 28, 2000, letter.

Your letter states there is no evidence that harvesting the subject timber would cause "harm" to spotted owls. The Seibers requested a permit authorizing incidental take of the threatened northern spotted owl in the event that logging 40 acres of forest on their property would result in take. As discussed above, logging the 40 acres would result in the removal of a significant portion of the spotted owl core area that surrounds an active nest site as determined using the above referenced protocol, and which represents some of the best habitat immediately surrounding the activity center. The logging poses a risk of incidental take of the owls. Your clients' application for an incidental take permit under the Endangered Species Act indicates they are concerned about that risk. However, as discussed in our July 6, 2000, letter to you, the mitigation and minimization measures in the Seibers' proposed HCP do not meet the permit issuance criteria [16 U.S.C. Section 1539(a)(2)(B)] for such a permit.

Though cooperation with the Seibers and yourself, we can develop a resolution to this matter that addresses your expressed concern regarding a potential property takings. We believe there are numerous ways to adequately address the impacts to spotted owls and their habitat discussed above, and we stand ready to work with you and the Seibers to develop an adequate habitat conservation plan.

For the reasons expressed above, your client's request for reconsideration is denied. No new information was presented in your July 28, 2000, letter that rebuts the Assistant Regional Director's reasons for denial of-their original application. As stated in our July 6, 2000, letter to you, we are available to provide technical assistance for identifying alternatives that

can satisfy the issuance criteria for an incidental take permit as well as the reasonable timber management objectives of your clients.

In accordance with 50 CFR 13.29(e), you may submit a written appeal to the Regional Director. Such a request must be submitted in writing to Anne Badgley, Regional Director, at this office within 45 calendar days of the date of this letter. The appear should state the reasons and issues upon which the appeal is based and may contain any additional evidence or arguments to support the appeal. The Regional Director may determine that oral arguments are necessary to clarify issues raised in the written record. See 50 CFR 13.29(f).

If you have any questions, you may refer them to Katherine Hollar of this office at (503) 231-6241, or Richard Szlemp of our Oregon State Office at (503) 231-5179.

Sincerely,

/s/ Rowan W. Gould
ROWAN W. GOULD
Deputy Regional Director

APPENDIX J

[LOGO]

UNITED STATES DEPARTMENT OF THE INTERIOR
FISH AND WILDLIFE SERVICE
911 N.E. 11th Avenue
Portland, Oregon 97232-4181

[Filed Jul. 6, 2000]

In reply refer to:
AES-ES

Mr. Phil Chadsey
Stoel Rives LLP
900 SW Fifth Avenue, Suite 2600
Portland, Oregon 97204-1268 .

Dear Mr. Chadsey:

This responds to Marsha and Albert Seiber's November 24, 1999, application under section 10(a)(1)(B) of the Endangered Species Act (ESA) and the accompanying Habitat Conservation Plan (HCP) for the Wiley Creek Unit. In that application, the Seibers requested authorization to incidentally take the threatened northern spotted owl (owl) by harvesting 40 acres of forest within their approximately 200-acre property in Linn County, Oregon. I regret to inform you that this application must be denied for the reasons discussed below. However, we are convinced that other approvable alternatives are available for the subject timber harvest, as discussed below.

Before the Fish and Wildlife Service (Service) can issue an incidental take permit, we must make the following findings: (1) the taking will be incidental; (2) the applicant will, to the maximum extent practicable, minimize and mitigate the impacts of such taking; (3) the applicant will ensure that

adequate funding for the plan will be provided; (4) the taking will not appreciably reduce the likelihood of the survival and recovery of the species in the wild; and (5) other measures the Secretary may require as being necessary or appropriate for purposes of the plan will be met (ESA Section 10 (a)(2)(B), 16 U.S.C. section 1539 (a)(2)(B)).

In order to make the finding that the HCP minimizes and mitigates the impacts of take to the maximum extent practicable, the Service first considers the adequacy of the minimization and mitigation program by determining if the proposed HCP is based on sound biological rationale and is commensurate with the impacts of take. The Service also considers whether it is the maximum that can be practically implemented by the applicant, typically by reviewing the mitigation programs provided by other applicants in similar situations. In other words, mitigation programs should be based on sound biological rationale; they should also be commensurate with the impacts they address and must be the maximum extent practicable (HCP Handbook, ESA Section 10 (a)(2)(B)(ii)).

The only owl minimization and mitigation measures in the Wiley Creek HCP are to: conduct harvest activities outside of the nesting season for the spotted owl (March 1—September 15) except for road-building; replant the harvest unit with Douglas-fir, western red cedar, and/or western hemlock; maintain riparian buffers as per the Oregon Forest Practices Act rules; and retain all snags and standing dead trees, except when they provide a safety hazard for logging.

Other than the seasonal harvest restriction, no time period is provided for the proposed length of the permit term. However, the Wiley Creek HCP proposes to complete all harvest operations prior to March 1, before the timber can be occupied by another pair of nesting owls. This would have effectively removed any benefits the proposed seasonal restriction could provide. Logging at times other than the owl

nesting season may minimize harm to a nesting pair of buds, but does not minimize and mitigate the incidental take resulting from the removal of the owl nesting habitat The loss of nesting habitat may lead to the incidental take of territorial owls, owls which are searching for territories, and owls which may seek to use this site in the future.

The Wiley Creek HCP does not contain any minimization or mitigation measures other than what is currently required by the Oregon Forest Practices Act regulations and enforced by the Oregon Department of Forestry. As part of the Service's listing process for the northern spotted owl under the ESA, we reviewed the provisions of the Oregon Forest Practices Act (as well as comparable state statutes in California and Washington) and determined that "clearly no state legislates adequate protection for spotted owls." We also concluded that "existing regulatory mechanisms were insufficient to protect either the northern spotted owl or its habitat." (55.FR 26114). The Wiley Creek HCP's sole reliance on Oregon Forest Practices Act regulations is not a sound biological rationale for minimizing and mitigating the take of the owl.

The proposed harvest would eliminate over one-half of a 70-acre spotted owl core area as defined under the Oregon Forest Practices Act rules. This area represents the best available habitat surrounding a nest site. The proposed harvest would reduce the likelihood that spotted owls would nest within the remainder of the core area due to the proximity of the harvest to the nest site (less than approximately 600 feet), the already fragmented nature of the surrounding forest, and the limited availability of suitable habitat in the area immediately adjacent to the 70-acre core area. Therefore, the likely outcome of the proposed *harvest would* be the loss of a spotted owl nest site, even though the nest tree itself would not be removed since it is located on an adjacent property. At the very least, 40 acres of suitable spotted owl habitat would be lost indefinitely.

The-spotted owls associated with the subject 70-acre core area were originally identified in 1991. In 1992, they exhibited signs of nesting. In 1993 they did not appear to nest. In 1994, they again exhibited signs of nesting. In 1995 and 1996 they were located, but did not appear to nest. They were not located in 1997 or 1998. In 1999, male responses were heard which resulted in the activity center still being considered as active under a generally accepted survey protocol endorsed by the Service and used by the State of Oregon ("Protocol for Surveying Proposed Management Activities that May Impact Northern Spotted Owls," March 17, 1992). The survey results for 2000 are not yet complete. To date, the female of the original pair has been found a few miles to the north of the site with a different male. The original male of the pair is currently unaccounted for pending the results of future surveys. Based upon the survey protocol, the activity center is still considered as active.

If the nest site is abandoned as a result of the proposed harvest, it will no longer serve as an activity center for the production of spotted owl young within the immediate geographic area. Spotted owls display a tendency to reuse an activity center over the years. It is not uncommon for one pair to vacate an activity center only to have another pair occupy the site. While it is difficult to predict where and when spotted owls will choose to nest, once they occupy a site, that site is likely to be used repeatedly. The activity center is a focal point for breeding spotted owls and generally contains nesting, roosting, and foraging opportunities whereas one or more of these types of habitats may not be present in a significant portion of the remainder of the home range of a pair of spotted owls. A pair of spotted owls that was using this site would have to search for a new suitable and unoccupied activity center that did not have a great deal of overlap with other existing owl territories. A pair that settles in an area with other spotted owls pairs would not only have to deal with defending their territory, but also would have to

compete for potentially limited food supplies. Searching for a new nest site may preclude a pair from nesting in a given year. This type of movement could also make the spotted owls more vulnerable to predation by great homed owls or northern goshawks.

In addition to reducing the viability of the owl nest site, the removal of 40 acres of the core area will have a negative impact on spotted owl foraging and roosting opportunities. As previously mentioned, the activity center and core area are not only important in the successful breeding of spotted owls, but provide important foraging habitat. Foraging opportunities will be reduced, which may result in a reduction in the breeding success of the adult birds and also a reduction in a readily available food supply for the developing young, potentially impacting their survival.

The surrounding forested landscape is fragmented and there is not an abundance of alternative foraging habitat within the immediate vicinity of the activity center. Foraging by the adults or any offspring would result in greater exposure to predation by great horned owls and northern goshawks because of the openness of the habitat and the greater distances that would be traveled to find adequate food.

The proposed alternative. does not provide any replacement habitat for areas lost through the harvest or provide identifiable suitable spotted owl habitat (nesting, roosting, or foraging) within the harvest area post-harvest. The proposed alternative does not provide any dispersal habitat that would allow owls to successfully migrate through the area in the process of locating' mates and suitable nesting sites. The net result is that there is essentially no mitigation being provided for the incidental take of spotted owls associated with the harvest of suitable habitat within close proximity to a nesting location. The incidental take would be either in the form of abandonment of the nest site, thus precluding future breeding, or loss of foraging and roosting opportunities which would

decrease the likelihood for spotted owls to survive and successfully reproduce in the area. For these reasons, the Service has determined that the proposed minimization and mitigation program is not commensurate with the impacts of take.

We have also determined that the proposed minimization and mitigation program in the Wiley Creek HCP is not the maximum extent practicable. In addition to the reasons discussed above, we reviewed two section 10 permits that have been issued to similarly situated landowners. In 1995, the Service issued a 20-year incidental take permit to Regli Estates in Humboldt County, California for 480 acres. In this HCP, suitable owl nesting and roosting habitat was converted into owl foraging and dispersal habitat. The applicant obtained take authorization for two pairs of owls even though adequate habitat was retained for one of the two pairs on the property. In addition to following seasonal harvest restrictions within 500 feet of nesting sites, the Regli Estates HCP provided for partial timber harvest on 320 acres that retained nesting or foraging habitat for owls. Another 50 acres which was grassland at the time of permit issuance, was planted with conifers to increase potential owl habitat in the future. And the remaining acreage was harvested in a manner that retained owl foraging habitat post-harvest.

The Service also issued a section 10 permit to the Scofield Corporation for a 40-acre parcel in Chelan County, approximately 4 miles northwest of Leavenworth, Washington. In this HCP, the owl nest site was located on-adjacent Federal lands and the harvest would have resulted in the take of one northern spotted owl pair. Some of the minimization and mitigation measures contained in this HCP were to: (1) conduct selective harvest of 54 percent of the volume of ponderosa pine, Douglas-fir and grand fir which comprises 28 percent of the total number of trees in the project area; (2) retain a no-harvest buffer averaging 300 feet in width between the highway right-of-way and the project area; (3)

remove all felled trees with a helicopter; (4) retain all trees 14 inches diameter breast height, and all snags when practicable; (5) time the harvest to preclude disturbance to spotted owls and other wildlife; and (6) place a deed restriction on the project area that prohibits future harvest or tree removal.

To date, the Service has issued 13 section 10 permits that authorize the incidental take permit of northern spotted owls, and is working cooperatively with approximately 20 other landowners to develop HCPs that address northern spotted owls. The two examples above represent just some of the options available to develop an adequate mitigation program. Because minimization and mitigation programs exist that are based on a sound biological rationale, are commensurate with the impacts they address, and are practicable, we have come to the conclusion that the mitigation offered in the Wiley Creek HCP does not meet either the section 10 permit issuance criteria or *follow the* Service's HCP handbook. Consequently, we have determined that the incidental take permit application for the Wiley Creek Unit must be denied.

In accordance with 50 CFR 13.29, you may request reconsideration of our decision to deny your application. Such a request must be submitted in writing to this office within 45 calendar days of the date of this letter and state the decision for which reconsideration is being requested and the reason(s) for the reconsideration, including presentation of any new information or facts pertinent to the issue(s) raised by the request for reconsideration. Your request for reconsideration must also contain a certification in substantially the same form as that provided by 50 CFR 13.12(a)(5).

At this time we wish to provide some criteria under which we believe a permit could be issued. Harvest alternatives for the subject 40 acres other than clearcutting, could be pursued. Selective harvest that retains the suitability of the habitat immediately after harvest and is maintained on the landscape for a specified permit term commensurate with the impacts of

the harvest may be permitted. Harvest that eliminates the suitability of the habitat for spotted owls for a period of time after harvest, but results in the regeneration and maintenance of habitat within the permit term may also be considered: Harvest alternatives that include the remainder of the Seiber property in addition to the proposed 40 acres could also be considered. This could involve variations of the harvest proposals discussed above, and also include mitigation and/or harvest options outside of the subject 40 acres. Inclusion of the remaining 160 acres of forested property could increase harvest options on the 40 acres considered in the incidental take permit application. These other forested portions of the property have varying degrees of spotted owl habitat quality. Selective harvest activities can be tailored to enhance available habitat over time, or foster the development of habitat in the future. A permit decision would include analysis of the amount of time anticipated for the enhancement or development of habitat conditions as well as the maintenance of those conditions for a period commensurate with the time that habitat was degraded. Harvest alternatives could also be considered outside of the subject 40 acres but within the Seiber's property, and the retention of the 40 acres could function as a component of the mitigation that offsets the impacts of the harvest in part or in whole.

We believe that the alternatives available to the Seibers are too numerous to outline in great detail here. We also believe that the Seibers should have the latitude to devise alternatives that meet specific management objectives while providing an appropriate level of mitigation for any spotted owl incidental take. We are available to provide technical assistance to the Seibers in developing alternatives and offer our assistance in finding harvest alternatives consistent with the objectives set forth under section 10 of the ESA.

We also want to inform you that the National Marine Fisheries Service has announced its intent to publish a Federal

Register notice invoking the section 9 take prohibitions for steelhead. Listed steelhead are found in Little Wiley Creek. If the proposed action is likely to result in the take of steelhead, the Seibers would need to obtain incidental take authorization from the National Marine Fisheries Service. The Fish and Wildlife Service does not have jurisdictional authority for steelhead or salmon species under the ESA.

If you have any questions, you may refer them to Katherine Hollar of our Portland Regional Office at (503) 231-6241, or Richard Szlemp of our Oregon State Office at (503) 231-6179.

Sincerely,

/s/ Vicki M. Fixin
VICKI M. FIXIN
Acting Assistant Regional Director

APPENDIX K

PHILLIP D. CHADSEY, OSB No. 66028
STOEL RIVES LLP
900 SW Fifth Avenue, Suite 2600
Portland, OR 97204-1268
Telephone: (503) 224-3380
Facsimile: (503) 220-2480
E-mail: pdchadsey@stoel.com

Attorney for Plaintiff

UNITED STATES DISTRICT COURT
DISTRICT OF OREGON

Civil No. CV '00 — 622 BR.

MARSHA and ALVIN SEIBER,
Plaintiffs,

v.

KEMPER McMASTER, STATE SUPERVISOR FOR U.S. FISH AND WILDLIFE SERVICE,
Defendant.

COMPLAINT

Mandamus To Require Defendant To Take Action on Plaintiffs' Application for an Incidental Take Permit

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Jurisdiction

1. This mandamus proceeding is brought pursuant to the All Writs Act, 28 USCA 18 § 1651(a) (1994) and 28 USCA § 1361 (1993).

Parties

2. Plaintiffs are the owners of and reside on a homestead (the "Homestead") in Linn County, Oregon that contains commercial timberland. Defendant is the regional director of the U.S. Fish and Wildlife Service (the "US'S "), who is charged with the duty and responsibility of enforcing and implementing the provisions of the Endangered Species Act (the "ESA")', 16 USCA § 1531, *et seq.*, (1985 & Supp 1999).

Claim for Relief

3. In 1990 the northern spotted owl (the "Owls") was declared a threatened species under the ESA, 16 USCA § 1534 (1985). The ESA requires that the USFWS designate "critical habitat" for the recovery of a threatened species. In designating "critical habitat" for the Owls, the USFWS did not include any habitat on private lands.

4. Before 1997 a pair of Owls was reported to have nested on the land bordering the north side of the Homestead. The land on which the Owls purportedly nested was not owned by plaintiffs.

5. Plaintiffs desire to harvest approximately 40 acres of mixed conifer, second-growth timber (the "subject timber"), on a. part of the Homestead that has been designated by the Oregon Board of Forestry (the "BOF") as part of a nesting site protected under state law for the Owls that have previously nested on the adjacent land. The BOF will not approve plaintiffs' plan to harvest the *subject* timber unless plaintiffs obtain from the USFWS an Incidental Take Permit ("ITP") for the Owls.

6. On November 24, 1999, plaintiffs submitted to the USFWS an application for an ITP, along with a Habitat Conservation Plan ("HCP") and an Implementation Agreement. ("IA"), together with payment of the required fee. At that time, plaintiffs requested that the USFWS act upon the

ITP application by December 24, 1999, so that if granted, the subject timber could be harvested before the 2000 nesting season.

7. The Habitat Conservation Planning Handbook (the "Handbook"). published by the USFWS, provides in part:

"1. *Expeditious Processing of Permit Applications.*

"In the first ten years of the section 10 HCP program (1983-1992), 14 incidental take permits were issued. As of August, 1996, 179 incidental take permits have been issued, and approximately 200 are in development. To cope with this growing section 10 workload and anticipated continued increases in the program, the Services intend to streamline the HCP process to the maximum extent practicable and allowable by law.

"To accomplish this, the handbook introduces numerous improvements to the section 10 program developed by the Services and the Departments of Interior and Commerce. First, the handbook establishes a category of HCPs called 'low-effect HCPs' which will apply to activities that are minor in scope and impact: these HCPs will receive expedited handling during the permit application processing phase. Second, the handbook improves guidance to Service personnel about section 10 program standards and procedures. Third, the handbook institutes numerous mechanisms to expedite the permit processing phase for all HCPs. Fourth, the handbook establishes specific time periods for processing incidental take permit applications once an HCP is submitted to the FWS or NMFS for approval.

"2. *The Low-effect HCP Category.*

"For purposes of the section 10 program, the Services establish a special category for HCPs with relatively minor or

negligible impacts. This 'low-effect HCP' category is defined as follows:

> "*Low-Effect HCPs*,—Those involving: (1) minor or negligible effects on federally listed, proposed, or candidate species and their habitats covered under the HCP; and (2) *minor or negligible* effects on other environmental values or resources. 'Low-effect incidental take permits are those permits that, despite their authorization of some small level of incidental take, individually and cumulatively have a minor or negligible effect on the species covered in the HCP. Low-effect HCPs may also apply to habitat-based HCPs if the permitted activities have minor or negligible effects to the species associated with the habitat-types covered in the HCP. Factors relevant to the determination that an activity is a low-effect activity include, but are not limited to, the effect of the activity on the distribution or the numbers of the species.
>
> "The relationship between the geographic size of a project and the scope or severity of its impacts will not always be clear-cut. Projects that are large or small in size often will have commensurately high or low effects. However, a project may be large in size, but still be categorized as low-effect if it is expected to result in minor or negligible impacts. Similarly, a project could be small in size but capable of generating very significant impacts (e. g., if it affects a species with a highly-restricted range).
>
> "The Services must consider each HCP on a case-by-case basis in determining whether it belongs in the low-effect category, taking into account all relevant factors including biological factors. The determination of whether an HCP qualifies for the low-effect category must be based on its anticipated impacts *prior* to implementation of the mitigation plan. The purpose of

this category is to expedite handling of HCPs for activities with inherently low impacts, not for projects with significant potential impacts that are subsequently reduced through mitigation programs. However, this determination should factor in actions taken by the applicant to avoid take, such as conducting activities during specific times to avoid the nesting season or by relocating project locations.

"3. *Processing Low-Effect Permit Applications.*

"Low-effect HCPs and permit applications often involve a single small land or other natural resource owner and relatively few acres of habitat. The impacts of such projects on federally listed species frequently are minor or negligible and the applicants often do not have the resources to withstand long delays.

"Consequently, an important guiding principle of the handbook is that permit application processing requirements for low-effect HCPs, as defined above, will be substantially simplified and permit issuance for such HCPs will be expedited to the maximum extent possible, consistent with Federal law.

"This will be accomplished by: (1) establishing clear processing standards for all HCP permit applications; (2) eliminating or standardizing section 10 documents for low-effect projects, wherever possible; (3) eliminating unnecessary review procedures; (4) categorically excluding low-effect HCPs from NEPA requirements; and (5) utilizing other techniques described throughout the handbook.

"4. *Summary of Permit Processing Requirements.*

"The primary documentation and processing requirements for HCPs by category are as follows. Both categories also require the permit document with applicable terms and conditions.

"*Low-effect HCPs* require: (1) an HCP; (2) an application form and fee ($25); (3) publication in the *Federal Resister* of a Notice of Receipt of a Permit Application; (4) formal section 7 consultation; (5) a Set of Findings, which evaluates a section 10(a)(1)(B) permit application in the context of permit issuance criteria found at section 10(a)(2)(B) of the ESA; and (6) an Environmental Action Memorandum, a brief document that serves as the Service's record of NEP.A compliance for categorically excluded actions by explaining the reasons the Services concluded that there will be no individual or cumulative significant effects on the environment. Implementing Agreements will not be prepared for a low-effect HCP, unless requested by the permit applicant. In such cases, acceptance of the legal terms and conditions of the permit by the applicant will provide the necessary assurance that the plan will be implemented. *Low-effect projects are categorically excluded from NEPA (see Chapter 5, Section A.2).*

"*All other HCPs* require: (1) an HCP; (2) an application form and fee ($25); (3) an Implementing Agreement (optional, depending on Regional Director discretion); (4) the NEPA analysis,, either an EA or EIS; (5) publication in the *Federal Register* of a Notice of Receipt of a Permit Application and Notice(s) of Availability of the NEPA analysis; (6) Solicitor's Office review of the application package; (7) formal section 7 consultation; and (8) a Set of Findings, which evaluates a section 10(a)(1)(B) permit application in the context of permit issuance criteria found at section 10(a)(2)(B) of the ESA and 50 CFR Part 17. Note: For NMFS, the NOAA General Counsel's Office (either in the Region or Headquarters) reviews all documents relating to all HCPs.

"An EA will satisfy NEPA requirements for a section 10 permit application and will conclude with a Finding of No Significant Impact .(FONSI), unless it is determined during

preparation of the EA that approval of the project is a major Federal action significantly affecting the quality of the human environment. It is not necessary to prepare an EA first, if it is determined from the start that an EIS is necessary, although an HCP that requires an EIS should be uncommon. In the latter case, an EIS and Record of Decision (ROD) is required. For some HCPs, it may be possible to prepare the EA in accordance with 40 CFR 1501.4(e)(2), which requires that any Finding of No Significant Impact (FONSI) in an EA be made available for public review for 30 days before an agency makes its final decision and can eliminate the need for an EIS [*see* Chapter 5, Section A.3].

"Figure 1 shows a diagram of the section 10 permit processing requirements from submission of the application package to permit issuance for a low-effect HCP that is categorically excluded from NEPA. Figures 2 and 3 show a diagram of the section 10 permit processing requirements from submission of the application package to permit issuance for an HCP that requires an EA and an EIS, respectively. "Habitat Conservation Planning Handbook at 1-8 to 1-10 (Nov. 1996) (emphasis in original).

8. The Handbook goes on to state that a low-effect HCP should take less than three months to process. An HCP that requires an Environmental Assessment should take three to five months and an HCP requiring an Environmental Impact Statement less than 10 months to process.

9. Since no private lands have been designated critical habitat for the Owls and the Owls have never nested on plaintiffs' land and the range of the Owls extends from British Columbia to Northern California, the USFWS has never indicated that plaintiffs' request for an ITP cannot be processed .as a low-effect HCP.

10. After plaintiffs submitted their ITP application, HCP and IA, two members of the USFWS staff visited the

Homestead on January 25, 2000 to inspect the timber the BOF had designated as protected Owl nesting habitat on plaintiffs' property. During that visit, the USFWS personnel advised Marsha Seiber to discharge her attorney and revise the HCP so as to protect other timber on the Homestead by agreeing not to log it, if plaintiffs desired to obtain an ITP that would allow them to harvest the subject timber.

11. Following the visit by the USFWS staff members on February 2, 2000, plaintiffs, through their attorney, made demand on the USFWS to publish notice in the Federal Register by no later than February 15, 2000.

12. On February 18, 2000, the USFWS published the required notice in the Federal Register.

13. On February 21, 2000 and again on March 28, 2000, plaintiffs' attorney wrote to the USFWS requesting information about some of the statements it had made in the Federal Register, on the latter date also requesting the USFWS to provide a schedule for completing any further actions required before making a final decision on plaintiffs' ITP application.

14. The USFWS has failed to respond to those inquiries and has otherwise failed to act upon plaintiffs' ITP application in a timely manner.

15. Due to a steady decline in the market for logs since plaintiffs submitted their ITP application, they are suffering an irreparable loss of income as a result of defendant's delay in acting upon their ITP application.

WHEREFORE, plaintiffs pray for an order of this court requiring defendant to either grant or deny the requested ITP without further delay.

DATED: May 8, 2000.

STOEL RIVES LLP

/s/ Phillip D. Chadsey
PHILLIP D. CHADSEY, OSB No. 66028
Telephone: (503) 294-9376

Attorney for Plaintiffs

APPENDIX L

May 4, 2000

DRAFT ENVIRONMENTAL ASSESSMENT

FOR THE
ISSUANCE OF AN INCIDENTAL TAKE PERMIT
UNDER SECTION 10(a)(1)(B) OF THE ENDANGERED
SPECIES ACT FOR THE INCIDENTAL TAKE OF THE
NORTHERN SPOTTED OWL (*Strix occidentalis caurina*)

TO
ALVIN J. AND MARSHA E. SEIBER FOR PROPERTY
LOCATED IN LINN COUNTY, OREGON

PREPARED BY

The U.S. Fish and Wildlife Service
2600 SE 98th Avenue, Suite 100
Portland, Oregon 97266

Contact: Richard Szlemp, Section 10 Coordinator
(503) 231-6179

1.0 Purpose of Action

1.1 Background

Alvin J. and Marsha E. Seiber seek an incidental take permit (ITP) from the U.S. Fish and Wildlife Service (FWS) pursuant to section 10(a)(1)(B) of the Endangered Species Act of 1973, as amended (ESA). The permit would authorize. incidental take of the northern spotted owl (*Strix occidentalis caurina*) (spotted owl), federally listed as threatened. The proposed taking would be incidental to timber harvest on approximately 40 acres of the Seiber's 200-acre property located in Linn county, Oregon. Pursuant to section 10(a)(2)(A), the Applicant has submitted an Habitat Conservation Plan (HCP) with the permit application,

The Seibers are retired and wish to generate supplemental retirement income through timber harvest on their property. The have harvested small portions or their property within the past five years. The property contains 145 to 165 acres of forested land all of which is contained within the spotted owl home range (1.5 miles radius from the nest), but only 40 acres of which is included within an Oregon Department of Forestry (ODF) designated nest core area. The remaining acreage is comprised of home site, agricultural land, or areas of recently harvested timber. These 40 acres that they propose to harvest are mature second growth timber located within the spotted owl nest core area.

Section 9 of the ESA prohibits the "take" of federally listed species of wildlife unless authorized under the provisions of section 7, section 10(a), or section 4(d) of the ESA. Section 3 of the ESA defines take as "to harass, harm, pursue, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." Section 10(a)(1)(B) defines "incidental take" as take that is "incidental to, and not the purpose of, the carrying out of an otherwise lawful activity." The terms "harass" and "harm" have been defined by Federal regula-

tions implementing the ESA. Harass means "an intentional or negligent act or omission which creates the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavioral patterns which include, but are not limited to, breeding, feeding or sheltering." Harm means "an act which actually kills or injures wildlife" and "may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding, or sheltering." A section 10 permit constitutes an exception to the taking prohibition of section 9.

The removal of timber harvest is likely to result in the incidental take of spotted owls through the removal of suitable habitat. This Environmental Assessment (EA) examines the environmental impacts associated with the issuance of a section 10(a)(1)(B) take permit for the proposed activity and three alternatives.

1.2 Proposed Action

The Seibers proposes to harvest approximately 40 acres of a 70-acre spotted owl nest core area as designated by the ODF. The Seibers removed XX acres of forest within the spotted owl home range in 19XX. The spotted owl nest site, located approximately 0.1 mile north of the proposed harvest area on adjacent private property, was last documented as active in 1996(?). Spotted owl nest surveys conducted in 1997 and 1998 by an adjacent landowner were inconclusive (?), however, a lone female was observed using the adjacent property in 1999(?).

2.0 Purpose and Need for the Action

The Seibers have applied for an ITP for the purpose of realizing economic gain from timber harvest on a portion of their property. The purpose of issuing a section 10(a)(1)(B) permit and implementing the associated HCP is to authorize incidental taking of listed species associated with timber harvest on

the subject 40 acres, in accordance with the requirements of the ESA and other applicable statutory and regulatory requirements. Such authorization is necessary because activities associated with the proposed timber harvest are likely to result in incidental take of spotted owls through habitat modification. The proposed timber harvest may impact other species, including listed species. However, the Applicant has only requested a permit for incidental take of spotted owls.

The ESA authorizes the issuance of an incidental take permit if the following criteria are met:

1. the taking will be incidental to an otherwise lawful activity;
2. the Applicant will minimize and mitigate the impact of such taking to the maximum extent practicable;
3. the Applicant ensures that adequate funding will be provided to implement the measures proposed in the HCP;
4. the proposed taking will not appreciably reduce the likelihood of the survival and recovery of the species in the wild;
5. and, the Applicant has provided other assurances as necessary that the HCP will be implemented.

The FWS may issue a permit conditioned on implementation of the HCP as submitted by the Applicant, specify other measures that may be necessary to meet the issuance criteria, or deny the permit.

3.0 Scoping/Public Participation

4.0 Alternatives Including the Proposed Action

4.1 Alternative A. Proposed Action: The Incidental Take Permit Application and HCP submitted by the Applicant (Seiber ITP application).

The Seiber ITP application would provide for maximum timber harvest allowable under the Oregon Forest Practices

Act (OFPA). The Applicant proposes to harvest approximately 40 acres mature second growth timber within a 70-acre spotted owl nest core area as designated by the ODF. The spotted owl home range surrounding this nest core area experienced additional habitat reduction through two independently conducted logging activities in 19XX and 19XX (Section 1.1).

The Applicant proposes the following measures to minimize potential impacts on the spotted owl:

- The Applicant, or contractor thereof, will conduct harvest activities outside of-the spotted owl nesting season (March 1 to September 15) except for road building.
- Douglas-fir (*Pseudotsuga menziesii*), western red-cedar (*Thuja plicata*), and/or western hemlock (*Tsuga heterophylla*) will be planted within the harvest units. As per OFPA Regulations, this planting will take place within 12 months of completion of harvest.
- The Applicant agrees to meet the current OFPA Regulations with regard to management of riparian areas, standing snag trees, and downed woody debris:

  a) maintain a 50-foot riparian management area (RMA) on the 500-foot stretch of the west fork of Cedar Creek;

  b) maintain a 70-foot RMAs the main and east fork of Cedar Creek. RMA distances are measured as a slope distance from the high water level of the main channel. Trees left to meet the vegetation retention requirements for one stream type shall not count towards the requirements of another stream type;

  c) retain all understory vegetation within ten feet and all trees within 20 feet of the high water level. All

trees leaning over the channel shall also be retained.

- The Applicant will leave, per acre harvested, a minimum of two snags or two green trees at least 30 feet in height and 11 inches in diameter at breast height (dbh) or larger, at least 50 percent of which are conifers .
- The Applicant will leave, per acre harvested, a minimum of two downed logs or downed trees, at least 50 percent of which are conifers, that each comprise at least 10 cubic feet gross volume and are no less than six feet long. One downed conifer or suitable hardwood log of at least 20 cubic feet gross volume and no less than six feet long can count as two logs.
- As per OFPA Regulations, the Applicant will leave standing and unharvested all snags and standing dead trees until they have fallen to the round and rotted away, except where they provide a safety hazard for the logging operation.

This ITP requested by the Applicant would only authorize the taking of the spotted owl (bald eagle?). Other federally listed or candidate species addressed in the HCP but for which an incidental take permit is not being requested include: bald eagle, white-footed vole, California wolverine, pacific fisher, pacific western big-eared bat, northwestern pond turtle, northern red-legged frog.

This alternative would eliminate spotted owl habitat for an unknown and indefinite period of time. This alternative would likely result in incidental take in the form of harm by impairing essential breeding, feeding, and sheltering behaviors of spotted owls.

4.2 Alternative B. No Action.

Under this alternative the FWS would not issue a permit or the Applicant would decide not to harvest the unit. It is

assumed that this alternative would maintain the existing mature second growth forest and the spotted owl nest core area within the Wiley Creek unit.

4.3 Alternative C. Selective Logging Outside Nest Core Area

In this alternative, the Applicant will employ selective logging measures to the 105 to 125 acre portions of the Wiley Creek unit outside of the 70-acre core nest area of suitable nesting spotted owl habitat (Map X). This would allow harvest within potential foraging and roosting habitat for spotted owls (?), but would avoid direct impacts to the core nest area.

This Alternative would provide for timber harvest within the following prescriptions:

- Remove no more than 40 percent of the standing tree basal area and retain trees that would be at least 11 inches dbh and have an average 40 percent canopy closure immediately after harvest.
- Retain all downed logs.

Additional measures which the Applicant would incorporate to minimize impacts to spotted owls and their habitat include:

- Prevention of disturbance or harassment of spotted owls resulting from operation activities by conducting all harvest and road building activities outside of the critical nesting period (March 1 to September 30).

5.0 Affected Environment

5.1 Location

Alvin J. and Marsha E. Seiber own approximately 200 acres of land located within T. 14 S. R 2 E., Section 8, approximately 10 miles southeast of the town of Sweet Home in the foothills of the western Cascades in Linn County, Oregon. The area is part of a landbase that is primarily comprised of

privately owned commercial timber land with comparatively small Willamette National Forest lands intermixed.

5.2 Watershed

The Wiley Creek unit is contained within the South Santiam River sub-basin of the Willamette River Watershed. Little Wiley Creek, a large fish-bearing stream, is located along the southern edge of the property. It is a tributary of Wiley Creek which flows into the South Santiam River. Cedar Creek, a small, forked tributary of Little Wiley Creek, is located along the east border of the property. The west fork of Cedar Creek is classified by ODF as a small fish-bearing stream while the remaining reaches on the Applicant property are classified as medium fish-bearing. Topographic relief varies across the property from 600' along the riparian zones to approximately 1200' on the ridges.

5.3 Regional Context

Linn County covers approximately 1,470,080 acres (2,297 square miles) of west-central Oregon and includes parts of the Willamette Valley, the western slope of the Cascade Mountains, and the Willamette National Forest (WNF). The principle land cover is forest with the federally owned Willamette National Forest occupying the eastern portion of the county and 56 percent of the remaining lands classified as commercial forest, primarily in private ownership. In addition to the "WNF, the U.S. Forest Service (FS) manages the 608 acre Wiley Creek Late Successional Reserve (LSR) in this area. Additional public lands in Linn County are owned and managed by the Bureau of Land Management and the State of Oregon. The lower foothills, portions of the Willamette Valley, and of the North Santiam, South Santiam, and Calalpooya River valleys have been converted to cash crops. High terraces and foothills are extensively grazed by cattle and sheep in addition to fruit, nut, and Christmas tree farms (USDA 1987).

Linn County is the eighth most populous county in Oregon with 103,000 residents (Oregon Blue Book 1999). The county is largely rural with population clustered in four cities. Approximately 37% of the population resides the county seat of Albany, while the cities of Lebanon, Sweet Home, and Harrisburg collectively house an additional 21% of Linn county residents (League of Oregon Cities 2000).

The climate of Linn County can be characterized as temperate with warm, rarely hot summers (July average temperatures are 65 degrees) and cool winters with average temperatures above freezing (Oregon Blue Book 1999, USDA 1987). The 42.55" average annual precipitation is generally distributed in the form of rain and is most frequent during late fall and winter.

5.4 Geology and Vegetation

The Wiley Creek Unit is located within the Western Cascades Physiographic Province (Franklin and Dyrness 1973) which occupies areas of thick sequences of successive Tertiary lava flows, tuffs, and intrusive rock deposits overlain by basalt (USDA and USDI 1998). Wiley Creek and its tributaries have relatively steep gradients and are susceptible to scouring and soil loss during heavy rains.

The South Santiam River sub-basin lies within the western hemlock and Pacific silver fir vegetation zones. The dominant tree species include Douglas-fir, western hemlock, western redcedar, Pacific silver fir (*Abies amabilis*), noble fir (*A. procera*), red alder (*Acer rubrurn*), and bigleaf maple (*Acer macrophyllum*). Vegetation along streams in this area is largely comprised of sword-fern (*Polystichuin spp.*), trailing blackberry (*Rebus discolor*), vine maple (*A. circinatum*), bigleaf maple, Douglas-fir, spruce (*Picea sitchensis*), cedar (*Thuja plicata*), and alder. Common understory species include vine maple, rhododendron (*Rhododendron spp.*), sword-fern, salal (*Gaultheria spp.*), huckleberry (*Vaccinium*

ovatum and *V. parvifolium*), and beargrass (*Xerophyllurn tenax*) (USDA 1995).

The predominant land cover on Wiley Creek unit is mature second growth forest, comprising 145 to 165 acres. Included within the mature second growth forest on the Applicant property is 40 acres of a 70-acre spotted owl nest core area designated in 1993 by the ODF. The remainder of the parcel includes the Applicant's home and an adjacent 10 to 15 acre area previously cleared .for agricultural purposes and maintained in an open condition (ag/old field?). Timber was harvested on 25 to 30 acres in 19XX and the area was subsequently replanted with conifer species in 19XX. Topographic relief varies across the property from 600' along the riparian zones to approximately 1200' on the ridges.

The Wiley LSR, managed for spotted owls and other late successional species, is within five miles of the Applicant property. The Wiley LSR is comprised of 70% old growth forest and is dominated by western hemlock (89%) and Douglas-fir (11%) (USDA and USDI 1998). Currently, there are no known spotted owl activity centers on this LSR.

5.5 Cultural Resources

XX (Cultural resource compliance was granted for nearby portions of Wiley Creek including sec 7, 17, 21, 22, 25, 26, 27, and 36 T.14S, R.2E and sec. 31 T.14S, R.3E, and sec 4 and 5, T.15S., R3E)

5.6 Federally Listed Wildlife

Northern Spotted Owl

Information on the taxonomy, ecology, and reproductive characteristics of the spotted owl is located in the 1997 and 1990 Fish and Wildlife Service Status Reviews (USDI 1987, 1990a); the 1989 Status Review Supplement (USDI 1989); the Interagency Scientific Committee (ISC) Report (Thomas

et al. 1990); and the final rule designating the spotted owl as a threatened species (USDI 1990b).

The spotted owl was federally listed as threatened primarily due to the loss of suitable habitat. Spotted owls tend to be associated with forest stands in which many of the trees are large, decadent live and dead trees. Generally, the greater the amount of forest older than 80 years, the greater the probability for finding spotted owls within those forests (Bart and Forsman 1992). Spotted owl habitat has been declining since the arrival of the first European settlers. It is estimated that there has been a reduction of between 60 and 90 percent of suitable spotted owl habitat over the past 200 years. Habitat reduction has not been uniform across the range of the spotted owl, but has been concentrated at lower elevations and in the coast Ranges. Approximately 90 percent of existing spotted owl habitat occurs on Federal land. Current logging practices that involve clearcutting, even-aged management, and rotations of less than 80 years are likely to preclude the development of mature and old growth conditions on the majority of non-federal lands.

Generally, suitable habitat refers to habitat that functions for nesting, roosting, and/or foraging. Spotted owls usually are found in larger forested stands exhibiting older forest structure that normally include mature or old-growth conifers with limited fragmentation. The stand usually has multiple canopies, with the secondary canopy often composed of both conifers and hardwoods under a conifer overstory. Canopy closure at nest sites is usually 60 percent or greater, with conifers at least 25 inches dbh. Most spotted owl nests have been found in mature and old growth forests. They do not build their nests, but use the broker: tops of trees, cavities within trees, or existing platforms that may have been built by other birds or mammals, or may be natural debris accumulations. Nests are most often found in forests with higher levels

of complexity and structure (*i.e.*, trees of different species, size, shape, and condition).

Although roosting habitat varies, for the purposes of this assessment it is defined as forested stands containing diversity in forest structure, crown closures of at least 40 percent, and some trees of at least 11-24 inches dbh. Integrated with the above factors are topography, slope, elevation, and aspect, all of which contribute to the ability of a spotted owl to survive. The spotted owl also can forage within roosting habitat. Roost sites are typically denser, multistoried stands in which owls can move around in to find favorable microclimate conditions depending upon the season or weather.

Spotted owl foraging habitat is the most variable, but may be largely influenced by the variable nature of prey species and the susceptibility of prey species to capture. Generally, foraging habitat is characterized by high canopy closure and complex structure. Foraging habitat has the least number of required characteristics. A stand could be considered as foraging habitat as long as a spotted owl can locate and capture prey while remaining in sufficient cover (nonnally a minimum of at least 40 percent canopy closure) to escape predation. This description does not include ally stand where tree density is too dense to allow a spotted owl to fly through. Primary prey species are small mammals that include northern flying squirrels (*Glaucornys sabrinus*) and dusky-footed (*Neotoma fuscipes*) and bushy-tailed (*N. cinerea*) woodrats, followed by tree voles (Arborimus and *Clethrionornys*) and mice (*Peromyscus spp.*).

There are approximately 5,899 pairs of spotted owls and resident singles (activity centers or sites) and approximately 8.1 million acres of suitable habitat currently estimated across the range of the species (Mayfield, pers comm., 1998). Recent demography studies (Forsman *et al.* 1996) indicate that the population is declining. While such a decline is expected to continue as spotted owl sites with severely

degraded habitat conditions become inactive, implementation of Alternative 9 (commonly referred to as the Northwest Forest Plan) of the Final Supplemental Environmental Impact Statement on Management of Habitat for Late Successional and Old Growth Forest Related Species within the Range of the Northern Spotted Owl (USDA & USDI 1994) is intended to abate the decline on Federal lands. However, non-federal lands are critical to the continued existence of spotted owls in certain areas, including northwestern Oregon (Thomas *et al.* 1990, USDI 1992a, USDA *et al.* 1993).

Owl "sites" are based upon a central location from which owls have established territories. Single owls or pairs of owls can establish a site. These sites may or may not be the location of nesting attempts. If a site is not being occupied by any owls from which they defend a territory, it is no longer considered active, but is nonetheless still labeled as a "site". Home ranges in the Western Cascades are generally considered to average about 1.5 miles from the site center, but they may not be circular, and there may be some overlap with adjacent owls on the outer half of the radius.

The Western Cascades Physiographic Province of Oregon is the state's largest province at 6.7 million acres and contains the largest acreage of nesting, roosting, and foraging habitat for spotted owls. Publicly owned land constitutes 68% (4.5 million acres) of the area, less than half of which provides suitable spotted owl nesting, roosting, or foraging habitat (2.1 million acres). Federal lands support 95 percent of the 1,389 known owl activity centers (*i.e.*, areas that owls have been known to use at one time or another), while 2.1 million acres of privately owned land in the province support the remaining five percent (63) of known owl activity centers (USDI 1992b).

Habitat loss and fragmentation due to timber harvest is a threat to spotted owl populations within the province, especially at lower elevations. Lower and middle elevations tend

to be more suitable spotted owl habitat while elevations above 4,500 feet are generally unsuitable habitat for spotted owls. Studies of spotted owl demographics from a five year period ending in 1991 indicated a seven percent annual decline in spotted owl populations in the central part of the province (USDI 1992b). An estimated 8.7 percent decrease in natural forest and an 18 percent decrease in interior habitat occurred in the central part of the province from 1972 to 1987(Ripple et al. 1991), indicating a pattern of loss of older forest and increased fragmentation. Bart and Forsman (1992) found that approximately 50 times more young owls fledged per square kilometer in areas with greater than 60 percent older forest than in areas of less than or equal to 20 percent older forest. Additionally, they found that landscapes with less than 20 percent older forest rarely provide suitable habitat for spotted owls. The ability for spotted owls to successfully fledge young is notably impaired when the habitat within this home range radius goes below 40 percent. Forty percent suitable habitat in the surrounding landscape, on average appears to be minimally adequate to support successful breeding by spotted owls while spotted owls have been known to successfully nest with less than 40 percent suitable habitat being available, this is relatively uncommon. Additionally, the need for an area of at least 70 acres of suitable habitat in the immediate vicinity of the nest site/activity center is considered crucial to maximize fledging success and to provide a buffer against disturbance (Miller 1989). This is commonly referred to as the nest core area.

As mentioned previously, the Applicant property contains 40 acres of a 70 acre spotted owl nest core area. The actual nest tree is located approximately 0.1 mile north of the proposed timber harvest area on the Applicant property. Spotted owls were documented as recently as 19XX at a nest site approximately 4.5 miles from the Applicant property at T. 14 S. R. 2 E. Section 26. Additional spotted owl nest sites in the vicinity of the Wiley Creek unit are XXXXX.

Bald Eagle

A detailed account of the taxonomy, ecology, and reproductive characteristics of the bald eagle is found in the Pacific States Bald Eagle Recovery Plan (USDI 1986), the final rule to reclassify the bald eagle from endangered to threatened in all of the lower 48 states (USDI 1995), and Stalmaster (1987). History and trends in the status of bald eagle nests in Oregon are tracked annually by Isaacs *et al.* (1997).

In the Pacific Northwest, bald eagles typically nest in multi-layered, uneven-aged, coniferous stands with old-growth trees that are located within one mile of large bodies of water (Anthony *et al.* 1982). Factors such as tree height, diameter, tree species, position on the landscape, distance from water, and distance from disturbance also appear to influence nest selection. Nest trees usually provide an unobstructed view of the associated water body. Live, mature trees with deformed tops are often selected for nesting. Availability of suitable trees for nesting and perching is critical for maintaining bald eagle populations. Bald eagles often construct several nests within a territory and alternate between them from year to year. Snags, trees with exposed lateral branches, or trees with dead tops are often present in nesting territories and are used for perching or as points of access to and from the nest. Such trees also provide vantage points from which territories can be defended.

The bald eagle was listed as a threatened species in Oregon and Washington under the ESA on February 14, 1978. This status is a result of past and present destruction of habitat, harassment, disturbance, shooting, electrocution, poisoning, a declining food base, and environmental contaminants. Currently, the primary threats to bald eagles are habitat degradation and, in some areas, environmental contaminants.

A Recovery Plan for the bald eagle in the Pacific states was issued in 1986 in accordance with section 4(f)(1) of the ESA.

The Pacific States Bald Eagle Recovery Plan established recovery population goals, habitat management goals, and management zones (*i.e.*, Recovery Zones) for a seven-state Pacific Recovery Region (Recovery Region).

Available information indicates that bald eagle populations are increasing range-wide. The species' status recovered sufficiently to warrant reclassification from endangered to threatened throughout the lower 48 states on July 12, 1995 (USDI 1995); this action did not change the status of the species for Oregon and Washington where it remains listed as threatened. In the Pacific Recovery Region, the number of occupied territories has consistently increased since 1986 and exceeded 800 for 5 years beginning in 1990 when 861 territories were reported. Although productivity objectives have been met and averaged about 1.03 young per occupied territory since 1990, distribution goals and nesting targets in several Recovery Zones within the Recovery Region have not been met (USDI 1995).

In Oregon, 308 breeding territories were occupied in 1997. Productivity resulted in a 5-year average of 0.92 young per occupied territory. Several Recovery Zones had productivity averages below 1.00 young per occupied territory in 1997, indicating that localized regions of poorer reproduction still persist within Oregon. Nesting success resulted in a 5-year average of 59 percent. Recovery population goals were met or exceeded in 8 of 10 (80 percent) Oregon Recovery Zones (Isaacs *et al*.1997).

Bald eagle nesting in Oregon generally occurs along coastal areas, estuaries, rivers and larger lakes in predominantly coniferous, uneven-aged stands with old-growth components. No eagles are known to utilize the Wiley Creek unit. Suitable nest trees may be currently present and the nearest large water-body is Foster Lake at approximately 3.5 miles northwest of the unit. The closest known nest sites are XXXXX.

5.7 Other Species of Concern

California Wolverine (*Gulo gulo luteus*)

The wolverine occurs in a broad range of habitats including coastal and boreal forest as well as tundra areas. Wolverines appear to avoid areas of human activity or development, and thus are often found primarily in wilderness areas. The wolverine is unlikely to occur within the Wiley Creek unit due to the level of human activity in the general area that is primarily logging-related. Therefore, this species will not be further addressed in this EA.

Pacific Fisher (*Martes pennanti pacifica*)

Fishers occur most commonly in dense, mature, coniferous forests at low to mid-elevations with canopy closure varying from 40 to 80 percent. Second growth and regenerating forests are also used by this species. The presence of high structural forest floor diversity and wetland or riparian areas also appear to be important. No surveys have been done for fishers on the Wiley Creek unit, although it does contain suitable habitat for Pacific fishers.

Pacific Western Big-Eared Bat (*Corynorhinus townsendii townsendii*)

The Pacific western big-eared bat, sometimes referred to as Townsend's big-eared bat, is a relatively wide-ranging species in terms of habitat types ranging from desert scrub to moist coniferous forest. In western Oregon, this species is associated with coniferous forest. The Pacific western big-eared bat is commonly considered a cavity or cave roosting species. They also utilize abandoned mines, buildings, and tunnels as roost sites. They commonly feed along forest edges, roads, or open areas within forests. Pacific western big-eared bats are unlikely to roost within the Wiley Creek unit due to a lack of appropriate caves, mines, or other types of cavities. Therefore, this species will not be further addressed in this EA.

White-footed vole (*Arborimus albipes*)

The white-footed vole has a limited distribution primarily west of the Willamette Valley in northern Oregon, along the coast in southern Oregon, and in extreme northwestern California. The species has been infrequently captured and has not been well studied. The white-footed vole tends to be more abundant in deciduous forest, although it is also found in coniferous forests of various ages and types. While it has been suggested that this species is associated with small streams, this association may be more directly tied to the presence of deciduous riparian tree species such as red alder. Although no survey data exist, the white-footed vole may occur within alder-dominated riparian areas on the Wiley Creek unit. No harvest is proposed within riparian corridors, per OFPA requirements.

Northern red-legged frog (*Rana aurora aurora*)

The northern red-legged frog occurs within lowlands west of the Cascade mountains in Oregon, Washington, and British Columbia. The northern red-legged frog lives in moist coniferous or deciduous forests and forested wetlands. They breed in cool, well-shaded ponds, lake edges, or slow low-flowing streams in winter and early spring. Since no surveys have been done, it is unknown whether these frogs may occur along the margins of Little Wiley Creek.

Northwestern pond turtle (*Clemmys marmorata marmorata*)

Northwestern pond turtles inhabit marshes, ponds, sloughs with well-vegetated shallow areas which provide juvenile resting and feeding habitat. The Wiley Creek unit does not contain suitable habitat for the northwestern pond turtle. There is not any suitable habitat nearby with any known occurrence of pond turtles. Therefore, they will not be further addressed in this EA.

6.0 Environmental Consequences

6.1 Background

The environmental consequences of each alternative on fish and wildlife species, land-use and social and environmental conditions are discussed below. Timber harvest conducted under any alternative would be subject to ODF forest practice rules which regulate matters that pertain to: road design, construction, and maintenance; slope stability; watercourse protection; chemical use; protection of identified resource sites; and post-harvest stocking. The primary difference among the action alternatives would be prescriptions that retain more and larger trees than required under the OFPA, and the resulting impact on fish and wildlife habitat and other environmental resources.

6.2 Alternative A. Proposed Action: The Incidental Take Permit Application and HCP submitted by the Applicant (Seiber ITP application).

A. Water Quality

Timber harvest and road building and maintenance proposed under Alternative A could affect water quality of Wiley Creek tributaries, Little Wiley Creek and Cedar Creek, through erosion, sedimentation, and increased water temperatures. Wiley Creek, a seventeen mile waterway which is the last tributary to South Santiarn River prior to Foster Dain, is a Type F stream which supports an increasing winter steelhead population. Wiley Creek has been the focus of an ODF and FWS habitat restoration effort in which improvements in stream structure, fish habitat, and fish passage are being implemented.

Alternative A would follow the OFPA regulations and allow for timber harvest in the northern portion of the property, nearest to Cedar Creek, classified by ODF as a medium fish-bearing stream. Approximately 500 feet of the west fork of

Cedar Creek located on the Applicant property is classified as a small fish-bearing stream. ODF regulations for small fish-bearing streams in the Interior Geographic Region maintain a 50-foot riparian management area (RMA) and 70-foot RMAs for medium fish-bearing streams. RMA distances are measured as a slope distance from the high water level of the main channel. Trees left to meet the vegetation retention requirements for one stream type shall not count towards the requirements of another stream type. ODF rules also require retention of all understory vegetation within ten feet and all trees within 20 feet of the high water level. All trees leaning over the channel shall also be retained.

Of the three alternatives reviewed in this EA, Alternative A would have the largest impact on water quality due to harvest on steep slopes with unstable soils and large scale clearing With very few live trees left per acre resulting in decreased water retention and rapid run-off Run-off from adjacent clear-cut areas would carry more sediment into the creek, likely resulting in increased sediment loads and a subsequent rise in stream temperatures.

B. Geology and Soils

The Wiley Creek unit contains well developed, fertile soils of volcanic origin susceptible to slump-earthflow movements. Approximately half of the area proposed for timber harvest under Alternative A is comprised of basalt overlain by a one to three foot layer gravelly and stony loam soils on steep slopes (60-90%). The remaining portion of the area proposed for timber harvest under Alternative A contains silty clay loam soils on a broad, relatively low slope bench area with relatively deep rooting zone and slight to moderate erosion hazard. The main concerns for timber harvest in these areas are related to erosion, windthrow hazard and seedling mortality. Erosion can be minimized by reducing soil disturbance during logging operations; by seeding roads, cutbanks, and landings; and by installing waterbars and culverts. Surface

stones can interfere with felling, yarding, and other equipment use while steep slopes can reduce utility of wheeled and tracked equipment on skid trails. Cable yarding provides increased safety while minimizing soil disturbance (USDA 1987). Road building would be required for implementation of Alternative A?

In summary, it is expected that Alternative A will result in soil disturbances, especially on the shallow, rocky soils in the northeast portion of the harvest area. Potential exists for mass slumping of soils and windthrow of standing live trees and snags, resulting in soil instability and difficulty with reforestation.

C. Cultural Resources

?

D. Vegetation

ODF minimum RMAs will be observed for Alternative A, resulting in a 70-foot riparian buffer on all but a 500-foot section of Cedar Creek for which there will be a 50-foot buffer. Areas outside of the RMA would be clearcut, resulting in an increase in edge effect and isolation along the riparian corridor. Run-off from adjacent clearcut areas would be more rapid increasing the potential for soil loss and slope instability which could denude the area of vegetation.

The Wiley Creek unit is primarily comprised of mature second growth coniferous forested habitat dominated by Douglas-fir and western hemlock. The site contains moderate to high canopy closure, a multilayered canopy dominated by larger overstory trees, and accumulations of logs and other woody debris on the forest floor?

Alternative A would result in a loss of mature second growth forest characteristics, a reduction of canopy coverage, and an alteration of the microclimate and forest structure conditions that are characteristic of mature forests. Mature second

growth conditions would be eliminated from the site for 80 years and the old growth component would be prevented from being realized for at least 150 years and perhaps permanently, depending on future forest practices and rotation length.

E. Northern Spotted Owls

Timber harvest within the Wiley Creek unit will contribute to loss of mature second growth mature forest habitat and increased fragmentation. Species associated with old growth or mature forests, such as the spotted owl, would be adversely impacted by the additional incremental loss of these forest types. Continued fragmentation of the forested landscape is a major factor in the decline of spotted owl populations. Generally, a nest core area of at least 70 acres of suitable habitat is considered important for a spotted owl pair to successfully produce and fledge young. Additionally, suitable habitat must be maintained on at least 40% of the area within a 1.5 mile radius around known nest locations to prevent impairment of breeding capability.

Alternative A would avoid direct harassment of any breeding spotted owls by setting a seasonal restriction on timber harvest activities between March 1 and September 15. Alternative A would reduce the spotted owl nest core area by 57% through the clearcutting of 40 acres of the mature second growth and nest core area. Thus, Alternative A would likely result in an incidental take of one pair of spotted owls as a consequence of habitat Modification.

F. American Bald Eagle

Need to obtain eagle location information for the surrounding area to determine if there are issues related to this species, if not: Alternative A would reduce suitable habitat for bald eagles on the Wiley Creek tract, thus reducing future colonization potential. However, there are no known nest sites

within the vicinity of the Wiley Creek unit, thus it is highly unlikely that there would be incidental take of this species.

G. Impacts to Other Wildlife Species

The Wiley Creek unit does not contain suitable habitat for California wolverines, northwestern pond turtle, and Pacific western big-eared bats. The unit contains suitable habitat for Pacific fishers, however due to the lack of survey data indicating this species' presence in the area, and to the availability of similar habitats in the vicinity, impacts to this species may be negligible?.

Habitat conditions for riparian associated species, such as the white-footed vole and the northern red-legged frog, will be conserved by limiting harvest within buffer areas adjacent to waterways. Alternative A is unlikely to result in incidental take to either of these species, however, it does allow timber harvest within 50-70 feet of Cedar Creek, which would increase fragmentation and isolation of the stream corridor and has potential to reduce migration potential for both of these species (harm XXX).

H. Land-use and Social and Economic Environment

No major changes in land-use are expected to occur as a result of implementing Alternative A since the area was previously zoned for agriculture and timber production and is in an area of active commercial timber extraction. Harvest would result in a small, short-term contribution to the existing local economy and a larger positive economic benefit to the Applicant.

I. Cumulative Impacts

Cumulative impacts are impacts on the environment that result from the incremental impact of an action when added to past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-federal) or person

undertakes such other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time.

Linn County is dominated by commercial forest lands the majority of which have been harvested over the past 200 years and are in the process of being harvested a second or even third time since the original timber harvest. The incremental impacts to the, environment of Alternative A, which involves the harvest of approximately 40 acres of timber, are relatively small when considered on a landscape basis due to impacts of previous harvest activities within the region. Spotted owls are more likely to survive and reproduce on larger, unfragmented forests containing suitable habitat structure. Habitat conditions surrounding the Wiley Creek unit will greatly influence spotted owl use of the unit. The predominance of second growth, early successional, even-aged, low diversity forest in the area is likely to increase in the future on private lands in this region. Due to the scope of this project and the existing environmental conditions, the cumulative impacts to water quality, geology, vegetation, fish, and wildlife, cultural sites and historic resources, and the social and economic environment associated with Alternative A are considered to be relatively small.

6.3 Alternative B. No Action

A. Water Quality

Alternative B would result in no timber harvest or road building activities within the Wiley Creek unit and is unlikely to have any adverse impact on existing water quality.

B. Geology

Alternative B would result in no timber harvest or road building activities within the Wiley Creek unit and is unlikely to have any adverse impact on existing geology.

C. Cultural Resources

Alternative B would result in no timber harvest or road building activities within the Wiley Creek unit and is unlikely to have any adverse impact on the cultural resources that may exist in this area.

D. Vegetation

Alternative B would result in no timber harvest or road building activities within the Wiley Creek unit and is unlikely to have any adverse impact on the vegetation.

E. Northern Spotted Owls

Alternative B would result in no timber harvest or road building activities within the Wiley Creek unit and is unlikely to have any adverse impact on spotted owls or the habitat thereof.

F. American Bald Eagle

Alternative B would result in no timber harvest or road building activities within the Wiley Creek unit and is unlikely to have any adverse impact on bald eagles or the habitat thereof.

G. Other Wildlife

Alternative B would result in no timber harvest, road building, or degradation to riparian corridors within the Wiley Creek unit and is unlikely to have any adverse impact on Pacific fishers, northern red-legged frogs, white-footed voles or the habitat thereof.

H. Land-use and Social and Economic Environment

Alternative B would result in no timber harvest or road building within the Wiley Creek unit, thus no additional economic benefits would be realized for the local economy or individual landowner.

I. Cumulative Impacts

Alternative B would result in no timber harvest, road building, or degradation to riparian corridors within the Wiley Creek unit. Under this alternative, land-use changes within the unit are not anticipated. Nor would the decision not to harvest this area influence land-use decisions on any other forested land in the surrounding area. The unit would continue to provide habitat for species associated with mature second growth and old growth forests, including spotted owls.

6.4 Alternative C. Selective logging Outside Nest Core Area.

A. Water Quality

Alternative C would result in..

LITERATURE CITED

Franklin, Jerry F. and C. T. Dyrness. 1973. Natural Vegetation of Oregon and Washington. USDA Forest Service General Technical Report. PNW-8.

Ripple, W. J., Johnson, D. H., Hershey, K. T., Meslow, E. C: 1991. Old-growth and mature forests near spotted owl nests in western Oregon. Journal of Wildlife Management. 55:316-318.

U.S. Department of Agriculture. 1995. South Santiam Watershed Analysis. US Forest Service, Willamette National Forest, Sweet Home Ranger District, Sweet Home, Oregon. 83 pp.

U.S. Department of Agriculture and U.S. Department of the Interior. 1998. Mid-Willamette Late Successional Reserve Assessment. Forest Service, Willamette National Forest, Eugene, Oregon. Bureau of Land Management, Salem District, Salem, Oregon. Fish and Wildlife Service, Oregon State Office, Portland, Oregon.

APPENDIX M

STOEL RIVES LLP
ATTORNEYS

STANDARD INSURANCE CENTER
900 SW FIFTH AVENUE, SUITE 2600
PORTLAND, OREGON 972044268
Phone (503)224 3380 Fax (503)220-2480
TDD (503)22]-1045
Internet www.stoel.com

[Filed Nov. 26, 1999]

November 24, 1999

PHILLIP D. CHADSEY
Direct Dial
(503) 294-9376
email pdchadsey@stoel.com

U.S. Fish and Wildlife Service
Ecological Services
Endangered Species Permits
911 NE 11th Avenue
Portland, OR 97232-4181

Re: Incidental Take Permit/Habitat Conservation Plan
Alvin J. Seiber and Marsha E. Seiber

Dear Sir or Madame:

I represent Alvin and Marsha Seiber and enclose on their behalf the following for filing:

1. Federal Fish and Wildlife License/Permit Application Form;
2. Implementation Agreement;
3. Habitat Conservation Plan; and
4. Filing fee in the amount of $25.

I assume that because this involves only, a single small landowner and a relatively few acres of habitat, this application can be processed as a low-effect HCP. Please publish notice in the Federal Register with the next 30 days. If you have any questions, please contact me rather than my clients directly. I will arrange for you to inspect the property at any mutually convenient time.

Very truly yours,

/s/ Philip D. Chadsey
PHILIP D. CHADSEY

PDC:kre
Enclosures
cc: Mr. and Mrs. Seiber
Docket

Department of the Interior
U.S. Fish and Wildlife Service

Expires (2/28/01)
OMB No. 1018-0094

FEDERAL FISH AND WILDLIFE LICENSE/PERMIT APPLICATION FORM

RETURN TO:

U.S. Fish and Wildlife Service
Ecological Services
Endangered Species Permits
911 N.E. 11th Avenue
Portland, Oregon 97232-4181

Type of Activity:

3-200-56 NATIVE ENDANGERED AND THREATENED SPECIES - INCIDENTAL TAKE

LEGAL DESCRIPTION: NW - NE Section 8; Township 14S; Range 2E

A. COMPLETE IF APPLYING AS AN INDIVIDUAL

1. Name: Alvin J. and Marsha E. Seiber

2. Street address: 45277 Wiley Creek Drive

3. County: Linn

4. City, State, Zip Code: Sweet Home, Oregon 97386

5. Date of birth: 3/2/36 (h) 2/2/48 (w)

6. Social security no.: 544-34-3223 (h) 540-60-9593 (w)

7. Occupation: Retired

8. List any business, agency, organizational, or institutional affiliation associated with the wildlife to be covered by this license or permit: N/A

9. Home telephone number: 541/367-4134

10. Work telephone number: N/A

11. Fax number: N/A

12. E:mail address:

B. COMPLETE IF APPLYING AS A BUSINESS, CORPORATION, PUBLIC AGENCY OR INSTITUTION

1. Name of business, agency or institution: N/A

2. Tax identification no.:

3. Street address:

4. County:

5. City, State, Zip Code

6. Describe the type of business, agency or institution:

7. Name and title of person responsible for permit (president, principal officer, director, etc.):

8. Home telephone number:

9. Work telephone number:

10. Fax number:

11. E:mail address:

C. ALL APPLICANTS COMPLETE

1. Do you currently have or have you had any Federal Fish and Wildlife License or Permit? Yes ☐ No ☒
If yes, list license or permit numbers:

2. Have you obtained any required state or foreign government approval to conduct the activity you propose? Yes ☐ No ☒ Not required ☐
If yes, provide a copy of the license or permit.

3. Enclose check or money order payable to the U.S. FISH AND WILDLIFE SERVICE in the amount of $ 25.00
Institutions which qualify under 50 CFR 13.11(d)(3) may be exempt from fees.

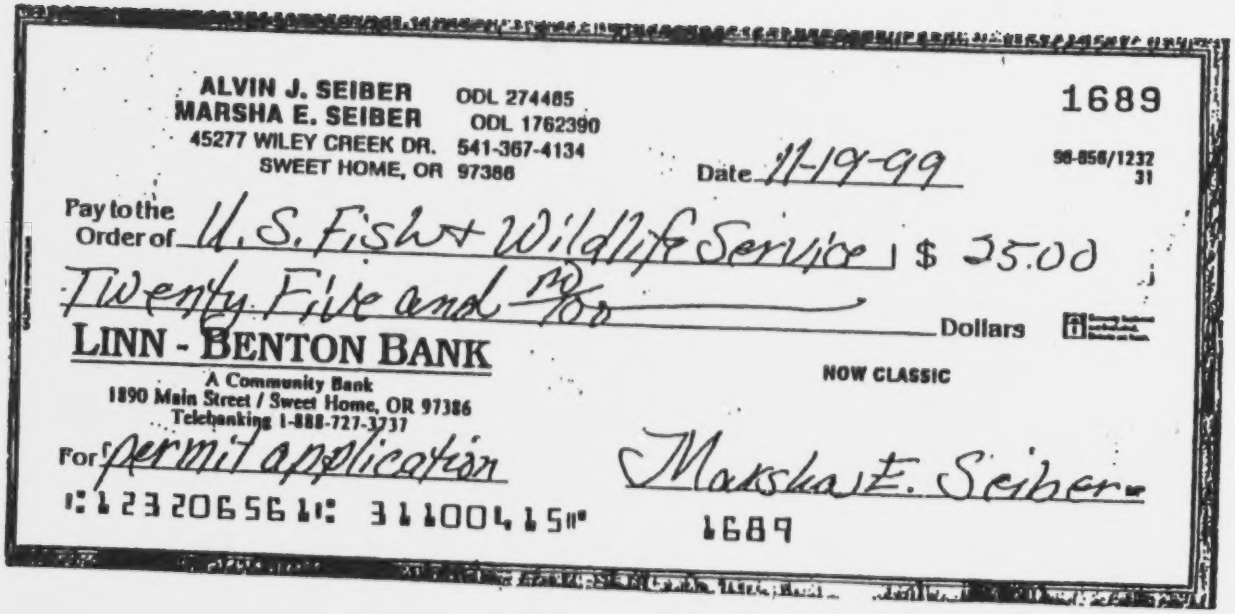
4. ATTACHMENTS: Complete the additional pages of this application. Application will not be considered complete without these pages. Incomplete applications may be returned.

CERTIFICATION: I hereby certify that I have read and am familiar with the regulations contained in Title 50, Part 13, of the Code of Federal Regulations and the other applicable parts in subchapter B of Chapter I of Title 50, and I further certify that the information submitted in this application for a license or permit is complete and accurate to the best of my knowledge and belief. I understand that any false statement herein may subject me to the criminal penalties of 18 U.S.C. 1001.

Signature (in ink) of applicant or person responsible for permit in Block A or B: Marsha F. Seiber

7. Date: 11-19-99

BEST AVAILABLE COPY



ALVIN J. SEIBER ODL 274485
MARSHA E. SEIBER ODL 1762390
45277 WILEY CREEK DR. 541-367-4134
SWEET HOME, OR 97386

1689

Date 11-19-99

98-858/1232
31

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Twenty Five and 00/100 Dollars

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A Community Bank
1890 Main Street / Sweet Home, OR 97386
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NOW CLASSIC

For permit application

Marsha E. Seiber

1689

⑆123206561⑆ 311004 15⑈

IMPLEMENTATION AGREEMENT FOR ALVIN AND MARSHA SEIBER, WILEY CREEK UNIT, LIMN COUNTY HABITAT CONSERVATION PLAN

THIS AGREEMENT is made and entered into the 19th day of November, 1999, by and between the Secretary of Interior acting through the United States Fish and Wildlife Service ("USFWS"), an agency of the federal government, and Alvin J. and Marsha E. Seiber ("the Seibers").

BACKGROUND

1.0 The Seibers owns and manages approximately 200 acres of commercial timberlands in Linn County, Oregon, known as the Wiley Creek Unit.

1.1 Approximately 40 acres of the Wiley Creek Unit consists of old growth and mature conifer timber that the Seibers have been enjoined from logging by the United States District Court for the District of Oregon, because in 1996 and earlier years it was used as nesting habitat by a pair of Northern Spotted Owls ("*Owls*").

1.2 Although they have not been observed on the Wiley Creek Unit, the timber is also suitable habitat for the Bald Eagle.

1.3 The aforementioned species are listed as threatened or endangered under the Federal Endangered Species Act, 16 USC § 1531, *et seq*., ("ESA"), and any taking, as that term is used in the ESA, of these species is prohibited, except as permitted by the ESA.

1.4 Incidental takings in accordance with an Incidental Take Permit ("ITP") issued by the USF&WS in conjunction with approval of a Habitat Conservation Plan ("HCP") are authorized by the ESA.

1.5 The Seibers have prepared an HCP for the Owls and other species that may use the types of habitat that occur on the Wiley Creek Unit.

1.6 The Seibers have applied to have an ITP for the Owls that have nested on the Wiley Creek Unit and those that might reside there in the future.

1.7 The USF&WS desires an Implementation Agreement to be signed by them and the Seibers to cover the issuance of the ITP.

1.8 The purpose of this Agreement is to obtain approval of the HCP and ITP covering the Seibers's harvest of its Wiley Creek Unit.

1.9 The USF&WS has given full consideration to the HCP and this Agreement and found them to meet the requirements for the issuance of an ITP under the ESA.

1.10 The Seibers have given full consideration to the HCP, the ITP, and this Agreement is in the best interests of its shareholders.

NOW, THEREFORE, in consideration of the mutual covenants and conditions contained below, the PARTIES agree as follows:

AGREEMENT

2.0 Specific Provisions.

2.1 The Seibers shall be allowed to harvest all of the merchantable timber on its Wiley Creek Unit to the extent allowed by the Oregon Forest Practices Act ("FPA").

2.2 In harvesting the Wiley Creek Unit, the Seibers logging operations will comply with the requirements of the FPA.

2.3 After the Wiley Creek Unit is harvested, the Seibers will replant the area with conifer species in accordance with the requirements of the FPA.

2.4 The HCP is intended to be, and by this reference is, incorporated herein.

3.0 General Provisions.

3.1 No Partnership. Except as otherwise expressly set forth herein, neither the commitments of the HCP, the ITP, nor this Agreement shall make or be deemed to make any PARTY to this Agreement the agent for or the partner of any other PARTY.

3.2 Not a Covenant Running With the Land. Neither the HCP, ITP, or this Agreement shall be construed to establish a .covenant that runs with the land.

3.3 Severability,. If any of the commitments of the HCP, the ITP, or this Agreement are found to be invalid or unenforceable, or this Agreement is terminated in part, all other commitments shall remain in effect to the extent they can be reasonably applied in the absence of such invalid, unenforceable, or terminated commitment or commitments.

3.4 Congressional Officials Not to Benefit. No member of or delegate to Congress shall be entitled to any share or part of this Agreement, or to any benefit that may arise from it.

3.5 No Third Party Contract Beneficiaries. The commitments of the HCP, the ITP, and this Agreement are not intended to create, and do not create, any. third-party beneficiary interest herein in the public or in any member thereof, nor shall it authorize anyone not a PARTY to this Agreement to maintain a suit based in whole or in part on ally provision of this Agreement, the HCP, or ITP. The rights of the public under the ESA are set forth in 16 USC .§ 1540(g) and nothing in this Agreement expands or otherwise alters the rights of citizens thereunder.

3.6 Counterparts. This Agreement may be executed in counterparts with each copy constituting an original. A complete original of this Agreement shall be maintained in the official records of each of the PARTIES hereto.

IN WITNESS WHEREOF, THE PARTIES HERETO have executed this Implementation Agreement to be in effect as of the date last signed below.

/s/ Alvin J. Seiber Date 11-19-99
ALVIN J. SEIBER\

/s/ Marsha E. Seiber Date 11-19-99
MARSHA J. SEIBER

UNITED STATES DEPARTMENT OF INTERIOR through the U.S. FISH AND WILDLIFE SERVICE

_____ Date: _____

HABITAT CONSERVATION PLAN
FOR
ALVIN AND MARSHA SEIBER
IN LINN COUNTY, OREGON

I. SUMMARY

Alvin and Marsha Seiber ("the Seibers") are the owners of a former homestead that consists of approximately 200 acres. The Seibers are retired and live on the property, which contains approximately 40 acres of second growth timber that the Oregon Department of Forestry ("ODF") has designated under its rules as northern spotted owl nesting habitat. The ODF has denied the Seibers written plan to log the subject timber, but under its rules the ODF is permitted to approve the Seiber's plan if they obtain an Incidental Take Permit ("ITP").

The last time any spotted owls occupied the 70 acre nesting area established by the ODF was in 1996, when the birds nested on a neighboring landowner's property. Surveys were conducted by the neighboring landowner in 1997 and 1998 and no owls were found. However, the neighboring landowner reported a female on its property during the 1999 nesting season.

The preferred alternative is to harvest all of the timber on the Seiber's portion of the subject protected area before the 2000 nesting season.

The only other alternative is to not harvest the subject timber and leave it standing so that it can be occupied as a northern spotted owl nesting site. There is considerable timber owned by the federal government located within the flying range of spotted owls that could be used as alternative nesting sites.

Since the Seibers are retired and rely upon income from harvesting the timber on their land, their inability to log the subject property is a hardship for them.

II. INTRODUCTION

The Seibers proposes the harvest of approximately 40 acres of timber from a 200 acre parcel of land located in Linn County, Oregon. Certain impacts of the proposed harvest on species listed as threatened under the Endangered Species Act are possible. This HCP was developed for the purpose of obtaining an Incidental take Permit to harvest timber in. an area that has been designated by the Oregon Department of Forestry as a northern spotted owl public resource site, pursuant to guidelines originally issued by the USF&WS. The nesting site has not been occupied since 1996. A single female was thought to have been in the area during the 1999 nesting season.

THEREFORE, ACTION ON THIS REQUEST FOR AN INCIDENTAL TAKE PERMIT MUST BE TAKEN BY FEBRUARY 1, 2000, SO THAT LOGGING CAN BE COMPLETED BY MARCH 1, 2000.

III. MANDATORY ELEMENTS OF A CONSERVATION PLAN

The USFWS has assembled a guidance document for the development of a HCP. The following plan sections have been written to address their mandatory elements.

A. Impacts likely to result from the proposed taking of one or more federally listed wildlife species.

This section presents the delineation of the conservation plan boundary, the collection and synthesis of necessary biological data focusing on the spotted owl, and a determination of proposed activities that may effect possible reduction of habitat within the plan area.

1. Conservation Plan Area

The proposed management action and subsequent focus of this HCP is located on a 200(±) acre parcel of private land

owned and managed by the Seibers. This parcel is located in Linn County, Oregon (Appendix 1).

The surrounding ownership consists of commercial timberlands and residences owned by other private landowners. There is also a considerable number of acres of federal timberlands in the vicinity.

Approximately 25 to 30 acres of the parcel has previously been logged and replanted with conifer species. Another 10 to 15 acres near the Seiber's home was cleared a number of years ago for agricultural purposes. Since 1988, the Seibers have replanted over 15,000 conifers on their land.

According to the information received, two species listed as threatened and six listed as candidate may occur in the plan area. The threatened species are the bald eagle and northern spotted owl. The list of candidate species include the white-footed vole, California wolverine, Pacific fisher, Pacific western big-eared bat, northwestern pond turtle, and the northern red-legged frog.

The northern spotted owl is the only species whose occurrence on or near the proposed _harvest site has been documented. The contents of this document are, therefore, focused towards the habitat requirements of that species.

Cumulative Effects Analysis

The Seiber's property has not been designated as "critical habitat" by the USFWS for recovery of the northern spotted owl. Most of the other commercial timberlands in Linn County, including those owned by the federal government, have either been logged or contain stands of timber that would provide just as good of nesting habitat as the subject timber. Due to the riparian buffer strip required by OFPA, the logging of the unit should have no impact on fish species. There is no fish bearing stream in the proposed logging area.

Land ownership in the area of concern.

In 1993 the ODF designated the subject timber as a part of a 70 acre northern spotted owl nesting site to be protected under the OFPA. Approximately 30 acres of adjacent timber owned by the CTC were also included in the protected core area.

2. Biological Data

Because the spotted owl is the only species documented to occur on or near the proposed harvest site it is addressed first. Discussions concerning the other species follow.

a. Spotted Owls. Federal Status—Threatened

As defined in the Interagency Scientific Committee (ISC) Report (Thomas et al. 1990) suitable spotted owl habitat is: moderate to high canopy closure; a multilayered canopy dominated by larger overstory trees; a high incidence of large trees with large cavities, broken tops, and other indicators of decadence; numerous large snags; heavy accumulations of logs and other woody debris on the forest floor; and considerable open space within and beneath the canopy.

According to the ISC, large tracts of interconnected reserves of suitable habitat are likely necessary to conserve the species. The ISC report also indicates that clusters of 20 pairs or more are likely to maintain themselves over time.

Impacts to Spotted Owls

The proposed harvest is not likely to affect the species as a whole.

The Seiber's property contains no known nest trees although a pair of owls nested on the adjacent CTC land as recently as 1996. Impacts from the proposed harvest would likely make it impossible for a pair of spotted owls to nest on the Seiber's property in the future.

Guidelines established, but subsequently rescinded by the USFWS, referenced research that indicated spotted owls have reduced reproductive outputs when the amount of suitable habitat within the home range of a resident spotted owl is decreased below the following parameters:

1) a core area of no less than 70 acres of suitable habitat.

2) 500 acres of suitable habitat, including the core area, within 0.7 miles of the center of the management circle.

3) 40% (1906 acres) of the 4766 acres within the expected 1.5 mile provincial radius should be suitable habitat.

According to the USFWS, loss of suitable habitat may substantially reduce the ability of spotted owls to reproduce successfully in the future. The proposed harvest will reduce the acres of suitable habitat available to a nesting pair below the above stated guidelines in the immediate area.

b. Bald Eagle. Federal Status - Threatened

The proposed action lies within the geographic range of the bald eagle. This species prefers to nest in areas that are dominated by mature or old growth timber. It also prefers to nest near fish bearing streams. One of the most important characteristics of bald eagle nesting habitat is an open forest structure. In the Pacific Northwest, canopy closure of stands containing bald eagle nests had a mean canopy closure of less than 50 % (Anthony and Isaacs 1981).

Impacts to Bald Eagles

Forest structure on the Seibers property meets the stand requirements of mature timber.

Although no bald eagles are known to have nested in the subject timber, the proposed harvesting would eliminate

the site as *bald* eagle habitat. No mitigation measures are proposed.

c. White-footed Vole. Federal Status—Category 2

The .white-footed vole is probably one of the rarest of the North American voles (Whitaker 1980). In Oregon, this species is found primarily west of the Willamette Valley in the northern portion of the State, and along the coast in the southern portion of the State.

While this species occurs in a variety of forest conditions (Olterman and Verts 1972) they occur primarily in riparian habitats along small streams in alder associations (Maser et al. 1981, Whitaker 1980). Another important habitat component is heavy cover consisting of downed logs or brush (Maser and Johnson 1967).

Impacts to White-footed Vole

It is unknown if white-footed voles are found on the Seiber s property. The riparian area along Wiley Creek may be suitable habitat for the White-footed 'Vole, especially where there is alder.

In accordance with OFPA requirements, no harvest is proposed within the riparian areas bordering on Wiley Creek.

This action will not impact areas believed to represent preferred habitats of the White-footed Vole. Because no impacts are expected and the White-footed Vole has not been listed as either an endangered or threatened species, no Mitigation measures are proposed.

d. California Wolverine. Federal Status—Category 2.

This species is primarily found throughout the boreal forest and tundra regions of North America. In Oregon, the wolverine is believed to occur statewide in mountainous regions, especially in the higher elevations of the Cascade Range, Blue, Wallowa, and Ochoco Mountains.

Wolverines appear to select scattered timber comprised of alpine fir, lodgepole pine, or western larch, over other timber types such as ponderosa pine, Douglas-fir, or western hemlock.

The timber types selected by wolverines may be a function of altitude. Most wolverine sightings recorded in Oregon and California have been at elevations from around 5000 feet to near timberline. The Seiber's property is located approximately 800 to 1100 feet above sea-level.

While not much is known about the distribution of the wolverine in Oregon the information that does exist indicates that it almost most certainly occurs in the Deschutes, Fremont, Malheur, Mt. Hood, Ochoco, Umpqua, Wallowa-Whitman, Willarzette and Winema National Forests (Marshall 1992a).

For the period between 1965 and 1989 a total of 84 wolverine sightings were. recorded in Oregon.

Impacts to California wolverine

The forest composition of the timber on the Seiber's property does not fit the description of that selected by the wolverine. Timber on the harvest site is primarily Douglas-fir, and western hemlock. As mentioned above, wolverines have a preference for timber types other than Douglas-fir and western hemlock. Further, no mitigation measures are proposed because the California wolverine has not been listed as either an endangered or threatened specie.

e. Pacific Fisher. Federal Status—Category 2

The range of the Pacific fisher extends from central and southern Canada south through the Great Lakes States, New York and New England. In the western United States, the fisher can be found in western Montana, northern Idaho, Washington, Oregon, *and* the Sierra Nevada Range in California.

The fisher is believed to prefer forests dominated by conifers. While canopy cover is important, the degree closure is variable, ranging between 40 and 80 percent. Fishers will utilize dense, mature, and old growth, second growth and even clearcuts, after cover has been established (Bailey 1936, Buck et al. 1983, and Powell 1982, in Marshall 1992b).

In Oregon the fisher is found in the Coast Range, Klamath Mountains, Cascade Range, and the Blue Mountains Marshall 1992b).

Impacts to Pacific Fisher

The description of this species' habitat requirements mentioned above resembles the forest found on the Seiber's property, as well as all other timbered lands in close proximity to the harvest site.

However, no mitigation for the loss of habitat available to the fisher is proposed because it has not been listed as either an endangered or threatened species.

f. Pacific Western Big-eared Bat. Federal Status—Category 2

The Pacific western big-eared bat, also known as the western big-eared bat or Townsend's big-eared bat, can be found in caves, lava tubes, 'abandoned mine tunnels, and abandoned buildings. This species relies upon these types of structures for both roosting and hibernating (Christy and West 1993).

The primary factor limiting the continued existence of this species is the availability of undisturbed cave sites with proper temperature conditions (Rodrick and Milner 1991).

Impacts to Pacific Western Big-eared Bat

No habitat which could be utilized by the Pacific western big-eared bat is known to exist on the proposed harvest site.

No impact upon this species or its habitat is expected as a result of the proposed action.

No mitigation measures are considered because the Pacific Western Big-eared Bat has not been listed as either an endangered or threatened specie.

g. Northwestern Pond Turtle. Federal Status—Category 2

The northwestern pond turtle can be found inhabiting in marshes, ponds, sloughs and small lakes. This species prefers waters with abundant aquatic vegetation and protected shallow areas where the juveniles may rest and feed under cover. Within the aquatic habitat adults require logs, banks or floating vegetation for basking during sunny periods. Nest sites are located in soft sod on upland sites with good sun exposure. Nest sites may be up to 1300 feet from water.

Wintering turtles hibernate on the pond bottoms, burying themselves in soft mud and sand (Rodrick and Milner 1991).

Impacts to Northwestern Pond Turtle

It is unknown whether or not northwestern pond turtles are found on or near the Seiber's property; however, the property does not contain any marshes, ponds, sloughs or small lakes.

No monitoring or mitigation measures are proposed because the Northwestern Pond Turtle has not been listed as either an endangered or threatened specie.

h. Northern Red-legged Frog. Federal Status—Category 2

The red-legged frog inhabits moist forests and valley riparian habitats west of the Cascades (Nussbaum et al. 1983).

While this frog is highly aquatic it can be found considerable distances from water, among ferns and other vegetation, in moist forest areas (Stebbins 1954). Nussbaum

et al. (1983) reported finding red-legged frogs 200 to 300 meters from standing water.

Breeding habitat for this species varies from temporary ponds to permanent lakes. Regardless of where this species breeds the water must have little or no flow and must have underwater stems for egg attachment (Nussbaum et al. 1983).

Impacts to Northern Red-legged Frog

It is unknown if red-legged frogs are found on or near the Seiber's property; however, the subject property does not contain suitable habitat for that species.

No monitoring or mitigation is proposed because the Northern Red-legged Frog has not been listed as either an endangered or threatened species.

3. Proposed Activities

Harvesting of approximately 40 acres of mature second growth timber.

B. Measures the permit applicant will undertake to monitor, minimize, and mitigate for such impacts; the funding that will be made available to undertake such measures; and the procedures to deal with unforeseen circumstances.

The relatively small size of the Seiber's property (200(±) acres) limits the mitigation possibilities.

Private timber lands are subject to the Rules of the Oregon Forest Practices Act. These Rules call for replanting of trees on area that have been harvested and leaving certain amounts of standing snags and down woody debris. The Seibers have been logging other timber on their property for a number of years and have complied with ODF rules, including replanting their land after harvesting timber.

1. Proposed Mitigation and Monitoring

The Seibers propose the following to mitigate the loss of habitat, minimize potential impacts on the spotted owl.

a. Conduct harvest activities outside of the nesting season for the spotted owl(March 1—September 15), except for road-building.

b. Douglas-fir, western redcedar, and/or western hemlock will be replanted over the harvest units. As per OFPA Rules this planting will take place within 12 months after completion of harvest.

c. The Seibers agree to meet the current OFPA Rules with regard to management of riparian areas.

d. The Seibers agree to meet the current OFPA Rules to leave standing and unharvested until they have fallen to the ground and rotted away, all snags and standing dead trees except when they provide a safety hazard for the logging operation.

C. Analysis of Alternatives

Alternative 1 (preferred alternative). The Seibers will harvest the unit to the extent allowed by the OFPA Rules. The proposed harvest will eliminate approximately 40 acres of mature second growth timber that the ODF .has designated as protected northern owl nesting habitat.

Different harvest options such as thinning or shelterwood would not result in a silvicultural benefit to the stand. The trees on this site are of an age that a partial cut or thinning would not release the remaining trees into rapid or significant additional growth. Selective harvesting is considerably more costly. Any partial cut that would maintain significant habitat would allow only an insignificant removal of timber that would not meet the sivicultural needs of the site.

Alternative 2 (no action alternative): Under this alternative the subject timber would be left standing to provide northern spotted owl habitat for any pair that may nest there in future.

This alternative was rejected because it would deny the Seibers of all economically productive use of the subject timber. The property is zoned as commercial forestlands and under land use goals it is to be used for sustained yield forestry. The Seiber's inability to harvest their timber deprives them of income that they need to support themselves in their retirement.

D. Additional measures the Director of the Service may require as necessary or appropriate.

An Implementation Agreement will be signed upon issuance of an Incidental Take Permit.

IV. CONCLUSION

Issuance Criteria for an Incidental Take Permit are to be met.

These issuance criteria are as follows:

(A) The taking will be incidental;

The taking in this case will be incidental to otherwise lawful timber harvest on private land.

(B) The Permit applicant will, to the maximum extent practicable, minimize and mitigate the impacts of such taking;

The section titled Proposed Mitigation and Monitoring outlines the measures to be taken to monitor, minimize, and mitigate the proposed incidental take.

(C) The applicants will ensure that adequate funding for the conservation plan;

Income from the harvest and sale of the subject timber will be made available to replant the harvested area and is a requirement of the OFPA.

(D) The taking may not appreciably reduce the likelihood of survival and recovery of the species in the wild;

This action will involve the removal of approximately 40 acres of suitable habitat available to the spotted owl. None of the subject timber has been designated as "critical habitat" by the USFWS for the survival of that or any other wildlife species.

The majority of suitable habitat available to protect the northern spotted owl is located on federal lands and enjoys protection status.

The USFWS will evaluate approval of this HCP pursuant to Section 7 of the ESA. As stated above, a decision by that agency is required by February 1, 2000, in order for the Seibers to be able to complete the logging before the 1999 nesting season begins in March.

(E) This applicant will ensure that other measures the Director may require as being necessary or appropriate will be provided;

The USFWS may require that an Implementation Agreement to ensure HCP implementation be signed by the Seibers.

(F) The Director is assured that the conservation plan will be implemented.

The Seibers are willing to sign an Implementation Agreement which assures that the HCP will be carried out.

The Implementation Agreement between the Seibers and USFWS will legally bind all parties to implementing and completing the provisions and requirements set forth in this document.

Submitted by:

Alvin Seiber	Date
Marsha Seiber	Date

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APPENDIX N

Endangered Species

Habitat Conservation Planning Handbook

U.S. Fish and Wildlife Service and National Marine Fisheries Service

November 1996

[SEAL] FORWARD [SEAL]

It gives us great pleasure to introduce this new Habitat Conservation Planning Handbook. It is the culmination of much hard work by dedicated U.S. Fish and Wildlife Service and National Marine Fisheries Service employees. It represents a great deal of collaboration with our conservation partners, and an important milestone in our ongoing efforts to make the Endangered Species Act (Act) more efficient and effective while providing voluntary opportunities for private landowners to be involved in conservation. With the streamlining measures and other innovations provided in this handbook, the Habitat Conservation Planning (HCP) process ranks as one of our greatest successes in seeking ways to reduce the Act's regulatory burden on private landowners while addressing the habitat needs of listed species.

HCPs reduce conflicts between listed species and economic use or development activities, allowing for the development of "creative partnerships" between the public and private sector which make the process work for both landowners and species. We have taken a process that was rarely used and have turned it into an increasingly utilized and successful way to provide private owners of natural resources with the creative flexibility and certainty they need to plan their activities while providing protection for listed species.

Species benefit too, and that is another strength of this process. It often expands the focus from conserving a single

species to looking at the ecosystem as a whole, and that can often keep species from declining long before they may need to be considered for listing. Thus, the HCP process provides many opportunities for willing owners of natural resources to make positive contributions to the conservation of species and their habitats. This allows landowners to become true partners in the conservation of our-precious natural heritage.

We would like to take this opportunity to express our heartfelt thanks for the hard work and dedication of all those who have made the development of the HCP process and this handbook possible. I especially want to thank those State, county and private natural resource owners who have become conservation partners with our Departments through this process. This document will be an important tool in threatened and endangered species conservation for our Nation.

/s/ Bruce Babbitt
BRUCE BABBITT
Secretary
Department of the Interior

/s/ D. James Baker
D. JAMES BAKER
Under Secretary for Oceans and Atmosphere
National Oceanic and Atmospheric Administration

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PREFACE

The habitat conservation planning (HCP) program under section 10(a)(1)(B) of the Endangered Species Act (ESA) has grown rapidly in recent years. In the first 10 years of the program (19834992), 14 incidental take permits were issued. As of the end of August, 1996, 179 incidental take permits had been issued and approximately 200 HCPs were being developed. In just a few years the HCP process has been transformed from a relatively little used option under the ESA to one of its most important and innovative conservation programs.

Another pattern has begun to emerge, as evidenced by the growing number of HCPs being developed and by the size of the conservation planning areas involved. As of late 1995, most HCPs approved were for planning areas less than 1,000 acres in size. However, of the HCPs being developed as of early 1996, approximately 25 exceed 10,000 acres in size, 25 exceed 100,000 acres, and 18 exceed 500,000 acres. This suggests that HCPs are evolving from a process adopted primarily to address single developments to a broad-based, landscape level planning tool utilized to achieve long-term biological and regulatory goals. It also suggests that the underlying spirit of the HCP process has begun to take hold.

These large-scale, regional HCPs can significantly reduce the burden of the ESA on small landowners by providing efficient mechanisms for compliance distributing the economic and logistic impacts of endangered species conservation among the community, and bringing a broad range of landowner activities under the HCPs' legal protection. In addition, the Services have helped reduce the burden on small landowners and have made it easier for them to be involved in the HCP process through streamlining measures in the HCP process.

The HCP process was patterned after the San Bruno Mountain HCP—an innovative land-use planning effort in California's San Francisco Bay area that began in the mid-1970s with a classic conflict between development activities and endangered species protection and culminated in the. issuance of the first incidental take permit in 1983. What made the San Bruno Mountain case unusual was that it attempted to resolve these conflicts through negotiation and compromise rather than continued litigation. This fundamental approach was endorsed and codified by Congress when it incorporated the HCP process into the ESA in 1982.

One of the great strengths of the HCP process is its flexibility. Conservation plans vary enormously in size and scope and in the activities they address—from half-acre lots to millions of acres, from forestry and agricultural activities to beach development, and from a single species to dozens of species. Another key is creativity. The ESA and its implementing regulations establish basic biological standards for HCPs but otherwise allow the creative potential of HCP participants to flourish. As a result, the HCP program has begun to produce some remarkably innovative natural resource use and conservation programs.

The challenge of balancing biology with economics is a complex one, but is fundamental to the HCP process. Policy and procedure have at times frustrated HCP users and hampered the program's ability to meet its full potential. The HCP process was historically viewed as procedurally difficult; permit approvals took too long in some cases and long-term regulatory certainty under HCPs was widely desired by applicants but rarely available.

However, the U.S. Fish and Wildlife Service and National Marine Fisheries Service have made significant improvements in the HCP program in recent years. We have increased section 10 staff and improved guidance about section 10 objectives and standards, clarified and streamlined permit

processing requirements, and substantially raised the certainty provided to HCP permittees. This handbook incorporates all these improvements and reflects updated policies and procedures in the HCP program.

The handbook is organized as follows. Chapter 1 provides a summary and overview of the HCP process. Chapter 2 summarizes the roles of the applicant and the Fish and Wildlife Service and National Marine Fisheries Services' Field, Regional, and Washington Offices. Chapter 3 explains the process of developing an HCP. Chapter 4 explains how unlisted species may be addressed in an HCP. Chapter 5 deals with section 10 NEPA requirements. Chapter 6 explains how to process and review an incidental take permit application. Chapter 7 explains the section 10 permit issuance criteria. Finally, Chapter 8 contains a glossary of important terms used throughout the handbook.

The handbook also contains numerous appendices, which include pertinent Federal regulations and policies; a reference list of publications about HCPs; "template" HCP documents that can be used as guides; and examples of HCP documents such as a permit application form and *Federal Register* notices. The handbook is organized to make information readily available. All important issues have labeled sections or subsections. The reader can find specific subjects of interest by scanning the Table of Contents and turning to the appropriate page.

/s/ [ILLEGIBLE]
Acting Director
U.S. Fish and Wildlife Service

/s/ [ILLEGIBLE]
Assistant Administrator for Fisheries
National Marine Fisheries Service

CHAPTER 1

THE ENDANGERED SPECIES ACT ANDINCIDENTAL TAKE PERMITS

A. Purpose of the Habitat Conservation Planning Process

The purpose of the-habitat conservation planning process and subsequent issuance of incidental take permits is to authorize the incidental take of threatened or endangered species, not to authorize the underlying activities that result in take. This process ensures that the effects of the authorized incidental take will be adequately minimized and mitigated to the maximum extent practicable.

B. Purpose of the Handbook

The purpose of this handbook is to guide the U.S. Fish and Wildlife Service (FWS) and National Marine Fisheries Service (NMFS) (collectively, the Services) in processing incidental take permit applications and participating in associated habitat conservation planning efforts. The goals of the handbook are threefold: (1) to ensure that the goals and intent of the conservation planning process under the Endangered Species Act are realized; (2) to establish clear standards that ensure consistent implementation of the section 10 program nationwide; and (3) to ensure that FWS and NMFS offices retain the flexibility needed to respond to specific local and regional conditions and a wide array of circumstances. Although intended primarily as internal agency guidance, this handbook is fully available for public evaluation and use, as appropriate.

C. Background and Legal Authority

Section 9 of the Endangered Species Act of 1973, as amended (ESA), prohibits the "take" of any fish or wildlife species listed under the ESA as endangered; under Federal regulation, take of fish or wildlife species listed as threatened is also prohibited unless otherwise specifically authorized by

regulation. Take, as defined by the ESA, means "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct."

In the 1982 amendments to the ESA, Congress established a provision in section 10 that allows for the "incidental take" of endangered and threatened species of wildlife by non-Federal entities. Incidental take is defined by the ESA as take that is "incidental to, and not the purpose of, the carrying out of an otherwise lawful activity." Prior to 1982, non-Federal parties undertaking otherwise lawful activities that were likely to result in take of listed species risked violating the section 9 prohibition but had no recourse under the law for exemption. Up to that time, only take occurring during scientific research and other conservation actions could be authorized under the ESA.

The "incidental take permit" process was established under section 10(a)(1)(B) of the ESA precisely to resolve this difficulty. Under this provision the Secretary of the Interior and Secretary of Commerce may, where appropriate, authorize the taking of federally listed wildlife or fish if such taking occurs incidentally during otherwise legal activities. The Secretaries of Interior and Commerce subsequently charged the Directors of the FWS and NMFS, respectively, with regulating the incidental taking of listed species under their jurisdiction.

Section 10(a)(2)(A) of the ESA requires an applicant for an incidental take permit to submit a "conservation plan" that specifies, among other things, the impacts that are likely to result from the taking and the measures the permit applicant will undertake to minimize and mitigate such impacts. Conservation plans under the ESA have come to be known as "habitat conservation plans" or "HCPs" for short. These terms axe used interchangeably throughout this handbook. The terms incidental take permit, section 10 permit, and section 10(a)(1)(B) permit are also used interchangeably in the

handbook. Section 10(a)(2)(B) of the ESA provides statutory criteria that must be satisfied before an incidental take permit can be issued.

Thus, section 10, as revised, provides a clear regulatory mechanism to permit the incidental take of federally listed fish and wildlife species by private interests and non-Federal government agencies during lawful land, water, and ocean use activities. However, Congress also intended this process to- reduce conflicts between listed species and economic development activities, and to provide a framework that would encourage "creative partnerships" between the public and private sectors and state, municipal, and Federal agencies in the interests of endangered and threatened species and habitat conservation (H.R. Rep. No. 97-835, 97th Congress, Second Session).

This is critically important, for Congress was not instituting merely a permit procedure but a process that, at its best, would integrate non-Federal development and land use activities with conservation goals, resolve conflicts between endangered species protection and economic activities on non-Federal lands, and create a climate of partnership and cooperation.

Congress also intended that HCPs could include conservation measures for candidate species, proposed species, and other species not listed under the ESA at the time an HCP is developed or a permit application is submitted. This can benefit the permittee by ensuring that the terms of an HCP will not change over time with subsequent species listings. It can also provide early protection for many species and, ideally, prevent subsequent declines and in some cases the need to list such species.

Congress modeled the 1982 section 10(a) amendments after the conservation plan developed by private land-owners and local governments to protect the habitat of two

federally listed butterfly species on San Bruno Mountain in San Mateo County, California. Congress also recognized that the circumstances surrounding the San Bruno Mountain HCP would not be universally applicable and that each HCP would be unique to its own factual setting.

The FWS published its final regulations for implementing the section 10 permit program in the *Federal, Register*, on September 30, 1985 (50 FR.39681-39691); NMFS published final regulations for the program on May 18, 1990 (55 FR 20603; see Appendix 1 for both regulations). However, because the process applies to a wide variety of projects and activities, the Services declined to promulgate "exhaustive, 'cookbook' regulations . . . detailing every possible element that could be required in conservation plans." Rather, the section 10 permit regulations reiterate ESA requirements and provide a framework for issuance and management of permits. Beyond that it is Service policy to promote "flexibility and ingenuity" in working with permit applicants and developing HCPs under the section 10 process.

In keeping with this policy, this handbook establishes detailed but flexible guidelines to be used in developing HCPs, processing section 10(a)(1)(B) permit applications, and managing ongoing HCP programs. It also attempts to correct the inevitable difficulties identified during the first 10 years of the section 10 program and to make it more efficient in the future. However, nothing in this handbook is intended to supersede or alter any aspect of Federal law or regulation pertaining to the conservation of endangered species.

D. Coordination Between FWS and NMFS

FWS and NMFS share joint authorities under the ESA for administering the incidental take permit program. Generally, the FWS is responsible for terrestrial and freshwater aquatic species while NMFS is responsible for listed marine mammals, anadromous fish, and other living

marine resources. Thus, HCP efforts in which FWS is involved tend to be land-based, while HCPs in which NMFS is involved are generally aquatic, addressing either marine or anadromous species. NMFS also issues permits for incidental taking of listed fish species during other activities such as state-run hatchery operations and commercial or recreational fisheries. In some cases these responsibilities overlap and the agencies work closely together—for example, in the Pacific Northwest many HCPs are being developed which address terrestrial species and anadromous fish in the same planning effort.

This handbook is intended to serve the needs of each agency's incidental take permit program. Although to date the FWS has had a more active program, and some sections consequently are written more from the FWS's land-based perspective,' it has been and is the intention of both agencies to develop and use the handbook jointly. It is also their intention to cooperate fully in joint administration of the section 10 program. However, there are procedural differences between the two agencies. Chapters 2 and 6 describe certain differences between FWS and NMFS with respect to organizational structure, permit delegation authority, and applicable Federal regulations, and Chapters 3 and 4 contain some information applicable to FWS only. All such differences are clearly indicated and unless otherwise noted the policies and procedures described in the handbook apply jointly to FWS and NMFS.

E. Overview of the Incidental Take Permit Process

1. *When is a Permit Needed?*

The starting point for the section 10(a)(1)(8}permit process is a determination that "take" is likely to occur during a proposed non-Federal activity and a decision by the landowner or project proponent to apply for an incidental take permit. Federal activities and non-Federal activities that

receive Federal funding or require a Federal permit (other than a section 10 permit) typically obtain incidental take authority through the consultation process under section 7 of the ESA. Thus, the HCP process is designed to address non-Federal land or water use or development activities that do not involve a Federal action that is subject to section 7 consultation.

In some cases, however, Federal agencies besides FWS or NMFS may be integrally involved in HCP efforts. In these cases, the action to be conducted by the Federal agency during the implementation of the HCP should be included as an additional element to be consulted on through the section 7 consultation conducted for the HCP. This allows the Services to .conduct one formal consultation that incorporates the actions for the HCP and any related and supportive Federal actions into one biological opinion. The biological opinion developed for the HCP should also incorporate the necessary biological analysis on the Federal action as well as the actions in the HCP to help eliminate duplication. Thus, the single biological opinion issued by the Services would address both the Federal action and the non-Federal action, and it would include an incidental take statement that authorizes any incidental take by the Federal agency and an incidental take permit that authorizes any incidental take by the section 10 permittee. *See* Chapter 3, Section A.1 and A.6 for more information.

Before determining whether a section to permit is needed, the applicant, with Service technical assistance, should consider whether take during 'proposed project activities can be avoided. This is sometimes possible through relocation of project facilities; timing restrictions, or similar measures, depending on the nature and extent of the proposed activity and the biology of the species involved. If take cannot be avoided, the Services will recommend that an incidental take permit be obtained. The decision to obtain a permit lies with

the prospective permit applicant. However, should the applicant ultimately elect not to obtain a permit, and an unauthorized take attributable to project activities occurs, the responsible individuals or entity would be liable under the enforcement provisions of the ESA.

2. *What Kinds of Activities Can be Authorized?*

A section 10(a)(1}(B) permit only authorizes take that is incidental to otherwise lawful activities. In this context, "otherwise lawful activities" means economic development or land or water use activities that, while they may result in take of federally listed species, are consistent with other Federal, state, and local laws. Take that occurs during other types of activities—i.e., take for scientific purposes, to enhance the propagation or survival of a listed species, or for purposes of establishment and maintenance of experimental populations—must be authorized by a permit under section 10(a)(1)(A) of the ESA (e.g., "Safe Harbor" or "recovery" permits). In same cases, however, take in the form of capture or harassment can be authorized under an incidental take permit, f the purpose of such actions is to minimize more serious forms of take (e.g., death or injury) or to conduct monitoring programs during activities authorized by the permit (*see* Chapter 7, Section B.1)

3. *Phases of the Process.*

Once the decision to obtain a permit has been made, the section 10 process consists of three phases: (1) the HCP development phase; (2) the formal permit processing phase; and (3) the post-issuance phase. The HCP development phase is the period during which the applicant's projector activity is integrated with species protection needs through development of the HCP. This phase is typically conducted by the applicant with technical assistance from FWS or NMFS Field Office and ends when a "complete, application package" is forwarded to the appropriate permit issuing office. A

complete application package consists of a permit application form, fee (if required), a completed HCP, a draft National Environmental Policy Act (NEPA) document (if required), and in some cases an Implementing Agreement (*see* Chapter 6, Section B.2).

The permit application processing phase involves review of .the application package by the appropriate Regional Office or, in some cases, the NMFS Washington, D.C., office; announcement in the *Federal Register* of the receipt of the permit application and availability of the NEPA analysis for public review and comment; infra-Service consultation under section 7 of the ESA; and determination whether the HCP meets ESA statutory issuance criteria. If FWS or NMFS determines, after considering public comment, that the HCP is statutorily complete and that permit issuance criteria have been satisfied, it must issue the permit. The Field Office and Regional Office should coordinate regularly throughout these first two phases of the HCP process to avoid any renegotiation of the terms of the HCP by the Regional Office (*see* Chapter 6, Section C.1).

The post-issuance phase is the period during which the permittee and other responsible entities implement the HCP and its monitoring and funding programs. Service responsibilities, in addition to any identified in the HCP, are to monitor the permittee's compliance with the conservation program and other terms and conditions of the permit, and the HCP's long-term progress and success. When a permit is issued, it is also Service policy to notify the public of the outcome of the permit application through a *Federal register* notice. An individual notice may be published for each permit decision, or a quarterly or biannual list of permit decisions for that period may be published. There are also specific notification requirements under NEPA.

4. *Compliance With NEPA and Section 7 of the ESA.*

Issuance of an incidental take permit is a Federal action subject to National Environmental Policy Act compliance. The purpose of NEPA is to promote analysis and disclosure of the environmental issues surrounding a proposed Federal action in order to reach a decision that reflects NEPA's mandate to strive for harmony between human activity and the natural world. Although section 10 and NEPA requirements overlap considerably, the scope of NEPA goes beyond that of the ESA by considering the impacts of a Federal action on non-wildlife resources such as water quality, air quality, and cultural resources. Depending on the scope and impact of the HCP, NEPA requirements can be satisfied by one of the three following documents or actions: (1) a categorical exclusion; (2) an Environmental Assessment (EA); or (3) an Environmental Impact Statement (EIS).

An EIS is required when the project or activity that would occur under the HCP is a major Federal action significantly affecting the quality of the human environment. An EA is prepared when it is unclear whether an EIS is needed or when the project does not require an EIS but is not eligible for a categorical exclusion. An EA culminates in either a decision to prepare an EIS or a Finding of No Significant Impact (FONSI). Activities which do not individually or cumulatively have a significant effect on the environment can be categorically excluded from NEPA. Chapter 5 of the handbook discusses NEPA requirements.

Issuance of an incidental take permit is also a Federal action subject to section 7 of the ESA. Section 7(a)(2) requires all Federal agencies, in consultation with the Services, to ensure that any action "authorized, funded, or carried out" by any such agency "is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse

modification" of critical habitat. Because issuance of a section 10 permit involves an authorization, it is subject to this provision. Although the provisions of section 7 and section 10 are similar, section 7 and its regulations introduce several considerations into the HCP process that are not explicitly required by section to—specifically, indirect effects, effects on federally listed plants, and effects on critical habitat. Chapter 3, Sections B.2(e)-(h) discuss these issues in detail. Chapter 6, Section C.3 explains how section 7 consultation for issuance of section 10(a)(l)(B) permits is conducted..

5. *Guiding Principles.*

The section 10 process is an opportunity to provide species protection and habitat conservation within the context of non-Federal development and Land and water use activities. Ideally, it may also allow for the conservation and recovery of federally listed, proposed, and candidate species as well as overall biological diversity. It thus provides a mechanism for allowing economic development that will not "appreciably reduce the likelihood of the survival and recovery of the species in the wild."

While species conservation is of course paramount, the section 10 process recognizes the importance of both biological and economic factors. Biologically, it provides FWS and NMFS with a tool, to minimize and mitigate the incidental take of listed, proposed, and candidate species at the local, rangewide, or ecosystem level. For landowners and local governments, it provides long-term assurances that their activities will be in compliance with the requirements of the ESA. For both sides, the HCP process promotes negotiation and compromise and provides an alternative to conflict and litigation.

The Services recognize the importance of working in partnership with non-Federal interests under section 10 of the

ESA. The Services are committed to facilitating such partnership by participating in all phases of the HCP process, providing timely assistance to permit applicants, expeditiously processing permit applications, and generally undertaking all measures necessary to ensure that the section 10 program is able to meet the growing challenges and opportunities of integrating endangered species protection with economic activities and needs. These principles are discussed further throughout this chapter and the entire handbook.

F. Overview of Permit Processing Requirements

Processing an incidental take permit application consists of announcing the HCP and NEPA analysis in the *Federal Register* and making them available for public review and continent; evaluating comments received, if any; conducting a consultation under section 7 of the ESA; and determining whether the HCP meets statutory issuance criteria under section 10(a)(2)(B) of the ESA. These basic steps are required for all HCPs. However, specific document and processing requirements will vary depending on the size, complexity, and impacts of the HCP involved (*see* sections F.2-F.5 below). Other documents or actions that may be needed depending on the HCP include the Implementing Agreement (Chapter 3, Section B.8), Environmental Action Memorandum, a brief document that provides the Service's record of NEPA compliance for categorically excluded actions (Chapter 6, Section B.2), and legal review of the application package (Chapter 6, Section C.4).

1 *Expeditious Processing of Permit Applications.*

In the first ten years of the section 10 HCP program (1983-1992), 14 incidental take permits were issued. As of August, 1996, 179 incidental take permits have been issued, and approximately 200 are in development. To cope with this growing section 10 workload and anticipated continued increases in the program, the Services intend to streamline the

HCP process to the maximum extent practicable and allowable by law.

To accomplish this, the handbook introduces numerous improvements to the section 10 program developed by the Services and the Departments of Interior and Commerce. First, the handbook establishes a category of HCPs called "low-effect HCPs" which will apply to activities that are minor in scope and impact; these HCPs will receive expedited handling during the permit application processing phase. Second, the handbook improves guidance to Service personnel about section 10 program standards and procedures. Third, the handbook institutes numerous mechanisms to expedite the permit processing phase for all HCPs. Fourth, the handbook establishes specific time periods for processing incidental take permit applications once an HCP is submitted to the FWS or NMFS for approval.

2. *The Low-effect HCP Category.*

For purposes of the section 10 program, the Services establish a special category for HCPs with relatively minor or negligible impacts. This low-effect HCP category is defined as follows:

> *Low-Effect HCPs*—Those involving: (1) minor or negligible effects on federally listed, proposed, or candidate species and their habitats covered under the HCP; and (2) minor or negligible effects on other environmental values or resources. "Low-effect" incidental take permits are those permits that, despite their authorization of some small level of incidental take, individually and cumulatively have a minor or negligible effect on the species covered in the HCP. Low-effect HCPs may also apply to habitat-based HCPs if the permitted activities have minor or negligible effects to the species associated with the habitat-types covered in the HCP. Factors relevant to the determination that an

activity is a low-effect activity include, but are not limited to, the effect of the activity on the distribution or the numbers of the species.

The relationship between the geographic size of a project and the scope or severity of its impacts will not always be clear-cut. Projects that are large or small in size often will have commensurately high or low effects. However, a project may be large in size, but still be categorized as low-effect if it is expected to result in minor or negligible impacts. Similarly, a project could be small in size but capable of generating very significant impacts (e.g., if it affects a species with a highly-restricted range).

The Services must consider each HCP on a case-by-case basis in determining whether it belongs in the low-effect category, taking into account all relevant factors including biological factors. The determination of whether an HCP qualifies for the low-effect category must be based on its anticipated impacts prior to implementation of the mitigation plan. The purpose of this category is to expedite handling of HCPs for activities with inherently low impacts, not for projects with significant potential impacts that are subsequently reduced through mitigation programs. However, this determination should factor in actions taken by the applicant to avoid take, such as conducting activities during specific times to avoid the nesting season or by relocating project locations.

3 *Processing Low-Effect Permit Applications.*

Low-effect HCPs and permit applications often involve a single small land or other natural resource owner and relatively few acres of habitat. The impacts of such projects on federally listed species frequently are minor or negligible and the applicants often do not have the resources to withstand long delays.

Consequently, an important guiding principle of the handbook is that permit application processing requirements for low-effect HCPs, as defined above, will be substantially simplifed and permit issuance for such HCPs will be expedited to the maximum extent possible, consistent with Federal law.

This will be accomplished by: (1)establishing clear processing standards for all HCP permit applications; (2) eliminating or standardizing section 10 documents for low-effect projects, wherever possible; (3) eliminating unnecessary review procedures; (4) categorically excluding law-effect HCPs from NEPA requirements; and (5) utilizing other techniques described throughout the handbook.

4. *Summary of Permit Processing Requirements.*

The primary documentation and processing requirements for HCPs by category are as follows. Both categories also require the permit document with applicable terms and conditions.

Low-effect HCPs require: (1) an HCP; (2) an application form and fee ($25); (3) publication in the *Federal Register* of a Notice of Receipt of a Permit Application; (4) formal section 7 consultation; (5) a Set of Findings, which evaluates a section 10(a)(1)(B) permit application in the context of permit issuance criteria found at section 10(a}(2)(B) of the ESA; and (6) an Environmental Action Memorandum, a brief document that serves as the Service's record of NEPA compliance for categorically excluded actions by explaining the reasons the Services concluded that there will be no individual or cumulative significant effects on the environment. Implementing Agreements will not be prepared for slow-effect HCP, unless requested by the permit applicant. In such cases, acceptance of the legal terms and conditions of the permit by the applicant will provide the necessary assurance that the plan will be implemented. *Low-*

effect projects are categorically excluded from NEPA(see Chapter 5. Section A.2).

All other HCPs require: (1) an HCP; (2) an application form and fee ($25}; (3) an Implementing Agreement (optional, depending on Regional Director discretion); (4) the NEPA analysis, either an EA or EIS; (5) publication in the *Federal Register* of a Notice of Receipt of a Permit Application and Notice(s) of Availability of the NEPA analysis; (6) Solicitor's Office review of the application package; (7) formal section 7 consultation; and (8) a Set of Findings, which evaluates a section 10(a)(1)(B} permit application in the context of permit issuance criteria found at section 10(a)(2}(B) of the ESA and 50 CFR Part 17. Note: For NMFS, the NOAA General Counsel's Office (either in the Region or Headquarters) reviews all documents relating to all HCPs.

An EA will satisfy NEPA requirements for a section 10 permit application and will conclude with a Finding of No Significant Impact (FONSI), unless it is determined during preparation of the EA that approval of the project is a major Federal action significantly affecting the quality of the human environment. It is not necessary to prepare an EA first, if it is determined from the start that an EIS is necessary, although an HCP that requires an EIS should be uncommon. In the latter case, an EIS and Record of Decision (ROD) is required. For some HCPs, it may be possible to prepare the EA in accordance with 40 CFR 1501.4(e)(2), which requires that any Finding of No Significant Impact (FONSI) in an EA be made available for public review for 30 days before an agency makes its final decision and can eliminate the need for an EIS [*see* Chapter 5, Section A.3].

Figure 1 shows a diagram of the section 10 permit processing requirements from submission of the application package to permit issuance for a low-effect HCP that is categorically excluded from NEPA. Figures 2 and 3 show a

diagram of the section 10 permit processing requirements from submission of the application package to permit issuance for an HCP that requires an EA and an EIS, respectively.

5. *Target Permit Processing Times.*

The time required to process an incidental take permit application will vary depending on the size, complexity, and impacts of the HCP involved. The Services will work to complete all steps as expeditiously as possible. Procedurally, the most variable factor in permit processing requirements is the level of analysis required for the proposed HCP under NEPA—whether an EIS, EA, or a categorical exclusion—although other factors such as public controversy can also affect permit processing times.

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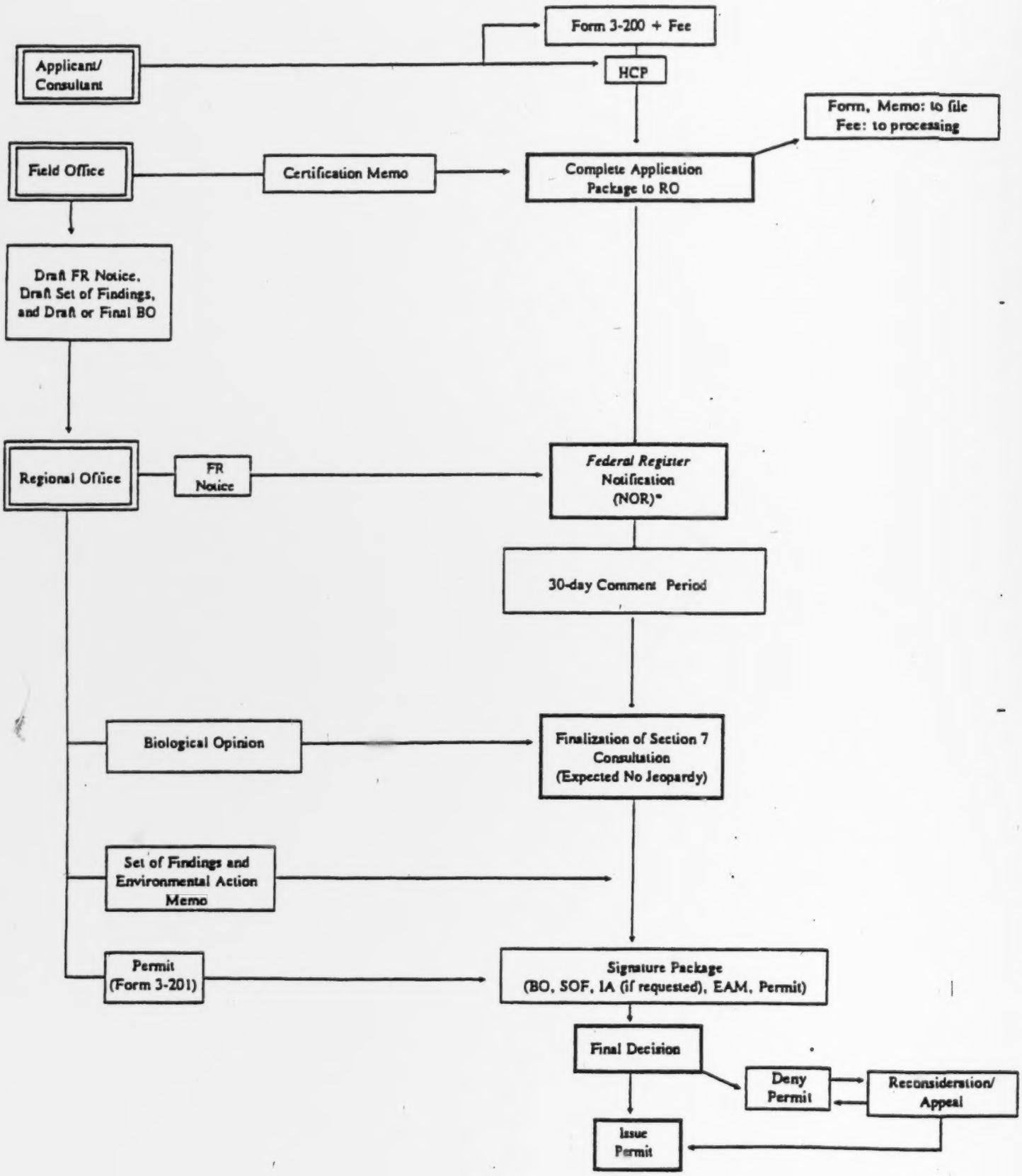
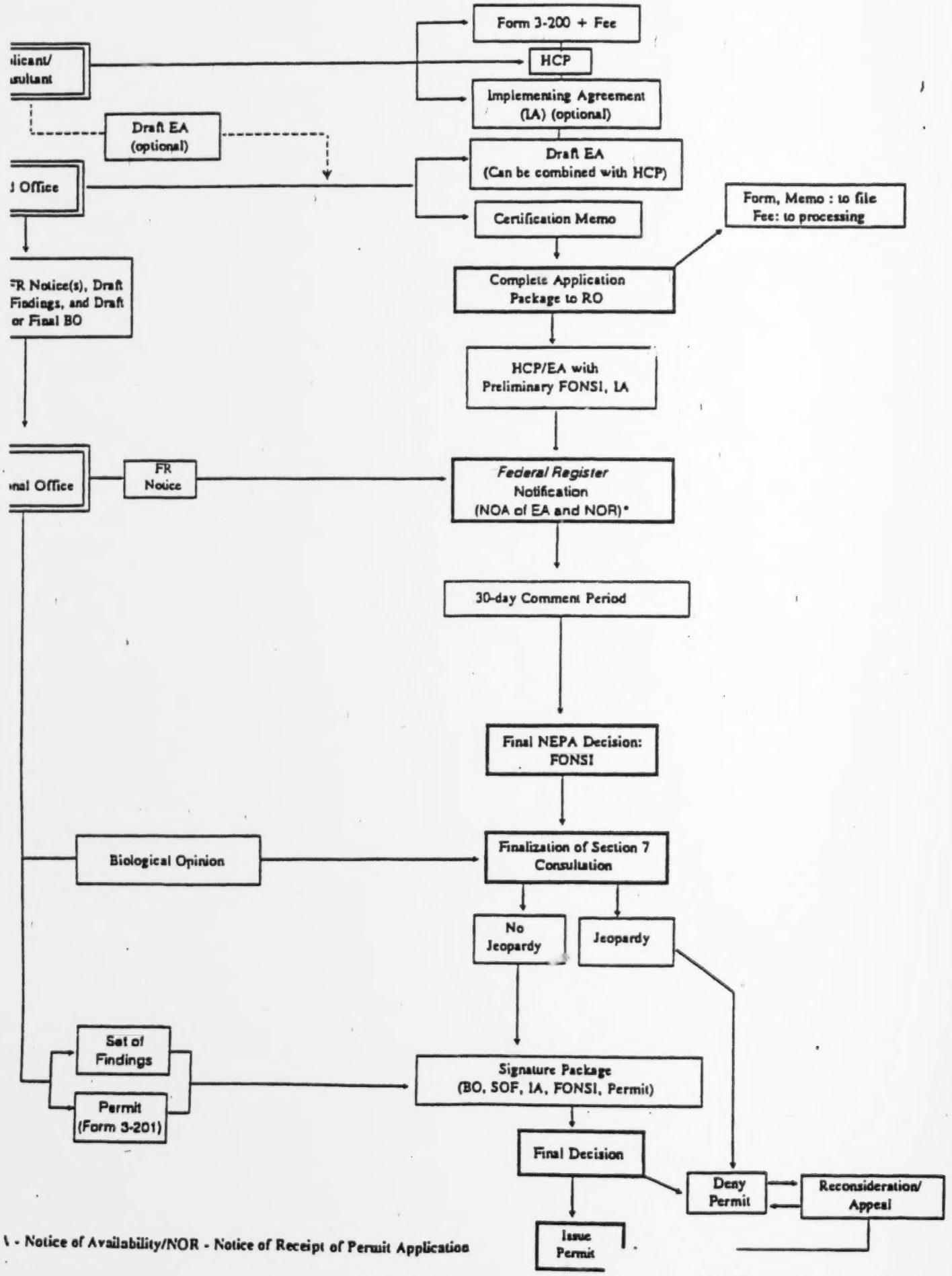
Figure 1: Typical Processing Steps for Low-effect Section 10(a)(1)(B) Incidental Take Permit Applications



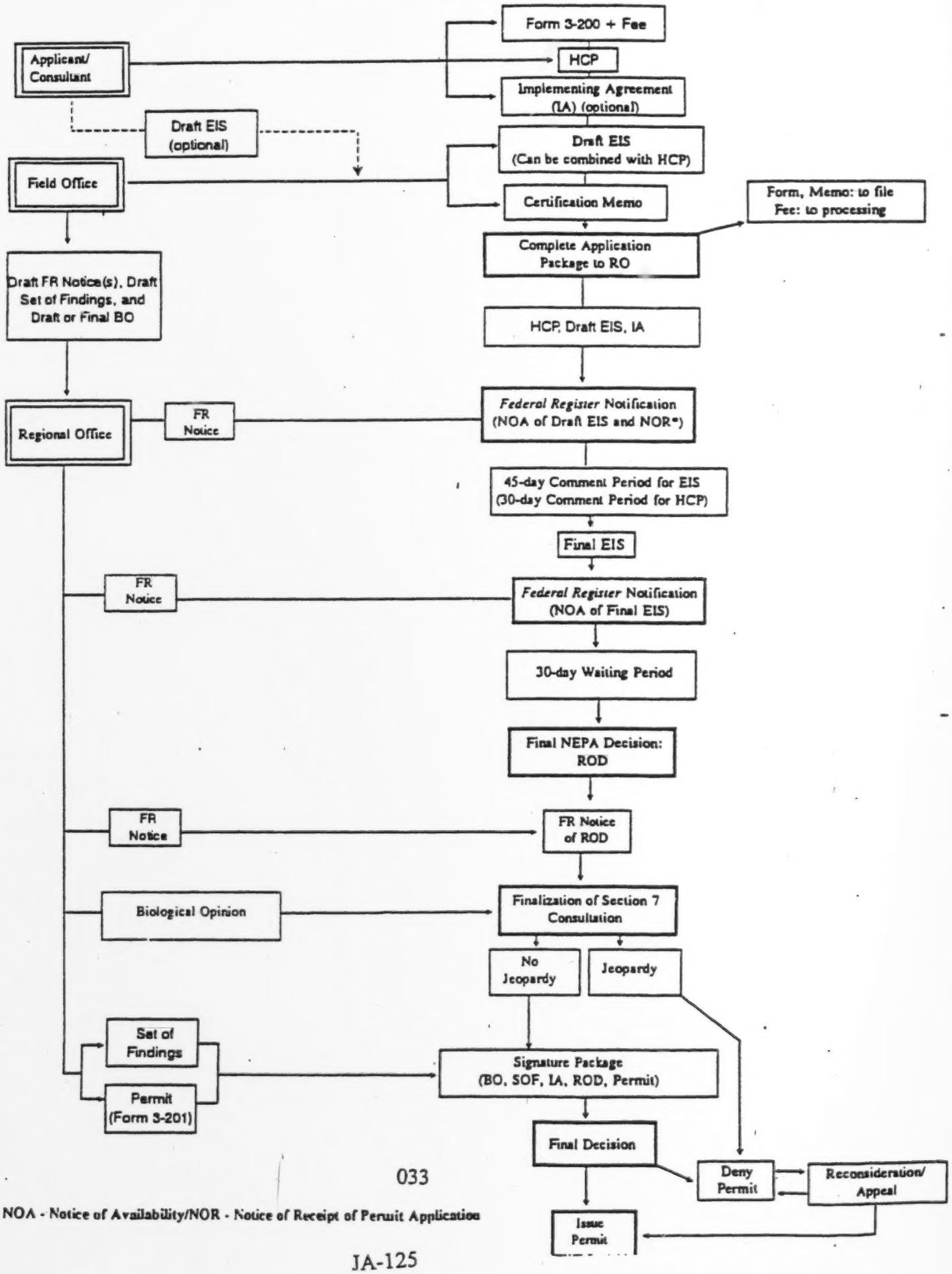
* NOR - Notice of Receipt of Permit Application

Figure 2: Typical Processing Steps for Section 10(a)(1)(B) Incidental Take Permit Applications Requiring an EA



* - Notice of Availability/NOR - Notice of Receipt of Permit Application

Figure 3: Typical Processing Steps for Section 10(a)(1)(B) Incidental Take Permit Applications Requiring an EIS



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* NOA - Notice of Availability/NOR - Notice of Receipt of Permit Application

The handbook establishes the following target permit processing requirements for HCPs based on the NEPA action. Although not mandated b law or regulation, these targets are adopted as FWS and NMFS policy and all Service offices are expected to streamline their incidental take permit programs and to meet these targets to the maximum extent practicable.

Perrmit processing times are defined as the period between receipt of a complete application package, as defined in Chanter 6, Section B.2(b), to the issuance of the incidental take permit. including Federal Register notifications and public comment. The Targets do not include anv portion of the HCP development phase.

Section 10(a)(1)(B) Permit Application Processing Times:

HCP With EIS ..... less than 10 months

HCP With EA .....3 - S months

Low-effect HCP (Categorically Excluded) ..... less than 3 months

These targets will apply as maximum processing times unless project controversy, staff or workload problems, or other legitimate reasons make delays unavoidable. However, in many cases it is expected actual processing times will be less than these targets and all FWS and NMFS offices are encouraged to improve on the targets whenever possible.

6. *Benefits of Regional or Multi-species Conservation Planning.*

Some HCP applicants may be tempted to segment (or "piecemeal") a project into parts to take advantage of reduced processing requirements for low-effect HCPs as compared to larger ones. The Services do not endorse such segmentation and will not allow use of the low-effect HCP category to avoid processing requirements without commensurate reductions in project impacts. In addition, slow-effect HCP may not be available for a segmented project or one component of a regional HCP because in determining

whether an action is categorically excluded from NEPA the Services must consider cumulative effects. The Services must also consider the interrelated, interdependent, and cumulative effects analyzed through the section 7 analysis.

Potential HCP applicants considering regional or multi-species HCPs may initially conclude that such efforts are undesirable in light of more streamlined processing requirements for low-effect projects. However, regional or multi-species HCPs have many benefits. They can, for example: (1) maximize flexibility and available options in developing mitigation programs; (2) reduce the economic and logistic burden of these programs on individual landowners by distributing their impacts; (3) reduce uncoordinated decision making, which can result in incremental habitat loss and inefficient project review; (4) provide the permittee with Long-term planning assurances and increase the number of species for which such assurances can be given; (5) bring a broad range of activities under the permit's legal protection; and (b) reduce the regulatory burden of ESA compliance for all affected participants.

The *cumulative* total of HCP processing requirements is far greater when regional or area-wide activities are permitted individually than when addressed comprehensively under a regional HCP.

Consequently, a second guiding principle of this handbook is that FWS and NMFS will continue to encourage state and local governments and private landowners to undertake regional and multi-species HCP .efforts as appropriate and will assist such efforts to the maximum extent practicable.

G. Helpful Hints

A successful HCP often requires consensus building and integration of numerous interests, especially for large-scale, regional planning efforts. Also, biological issues are not always clear-cut and sometimes are subject to interpretation.

Service biologists must combine flexibility, creativity, good science, and good judgement in providing technical assistance to HCP applicants and making the section 10 program successful. The following "rules of thumb" should be helpful in meeting these challenges.

- Review recovery plans for affected species and assess the extent to which HCP mitigation programs are consistent with them. Although FWS or NMFS cannot mandate that HCPs contribute to recovery, applicants should be encouraged to develop HCPs that produce a net positive effect on a species (*see* Chapter 3, Section B.3). Recovery plans should be used to help identify strategies to minimize and mitigate the effects of the HCP. When recovery plans are not available, contact recovery teams or other species experts to obtain information pertinent to HCP development. When appropriate, the development of the HCP could involve more active participation by recovery team members and species experts by providing technical assistance to the applicant.

- Keep up-to-date on applicable statutes and policies, including the ESA, its implementing regulations, this handbook, and court decisions. Understand the authorities and limitations of the ESA and NEPA. Be up-to-date on new biological developments and state-of-the-art techniques such as population viability analysis. Keep reference materials on hand concerning legal and biological issues applicable to the section 10 program (Appendix 2 contains a list of reference materials).

- The HCP is initiated by the applicant and is the applicant's document, not FWS's or NMFS's. The Services should assist the applicant and help guide the process by providing sufficient staff and

technical advice, However, .if the applicant insists on measures that would not allow the HCP to meet the section 10 issuance criteria, the Service will inform the applicant of the deficiencies in writing and offer assistance in developing a solution. If deficiencies are not corrected, the FWS or NMFS may ultimately have to deny the permit (*see* Chapter 6, Section F.1). Providing technical assistance early and continuously through the HCP development process will hopefully prevent such situations from occurring.

- Help the applicant determine early in the process what species are to be addressed in the HCP. This will depend on what species occur in the project area, whether they are likely to be affected by project activities, their listing status (listed, proposed, or candidate), the applicant's objectives, and other factors (*see* Chapter 3, Section A.5). The Service will encourage permit applicants to address any species in the plan area likely to be listed within the life of the permit. This can benefit the permittee in two ways: (1) the "No Surprises" policy applies to unlisted species that are adequately addressed in an HCP (*see* Chapter 3, Section B.5(a)); and (2) it prevents the need to revise an approved HCF should an unlisted species that occurs within the plan area but was not addressed in the HCP subsequently be listed (*see* Chapter 4). The Services should advise the applicant on this issue, but ultimately the decision about what species to include in the HCP is always the applicant's.

- Work with the applicant to get important issues on the table as early as possible in the HCP development stage, Make sure the applicant

understands the section 10 issuance criteria and any regulatory or biological issues that will need to be addressed in the HCP. Avoid "eleventh-hour" surprises that result in delays and bad feelings on all sides.

- HCP mitigation programs will be as varied as the projects they address. Some will be simple while those for large-scale, regional planning efforts may be quite complicated. There are few ironclad rules for mitigation programs but make sure they address specific needs of the species involved and that they are manageable and enforceable. A monitoring plan should be developed that establishes reporting requirements, biological criteria for measuring program success, and procedures for addressing deficiencies in HCP implementation (*see* Chapter 3, Sections B.3-B.5).

- Service Field Offices and Regional Offices must coordinate regularly throughout the HCP process and work as a team, not as isolated, separate players. This is essential to ensure that FWS or NMFS, as applicable, provide consistent, dependable assistance to the applicant in developing the HCP and that internal differences in approach are resolved prior to the submission of an HCP proposal to the Regional office for formal processing (*see* Chapter 6, Section C.I).

- The same principle cited immediately above applies to coordination between FWS and NMFS when an HCP includes the jurisdiction of both agencies. It is also important to obtain the views of the state wildlife and conservation agencies early and to address their comments.

- Make sure the Services' section 7 obligations as they apply to issuance of a section 10 permit are explained to the permit applicants) and that section 7 considerations are introduced into the HCP from the beginning of the planning process. Compliance of the HCP with section 7 and 10 of the ESA should be regarded as concurrent, integrated processes, not as independent and sequential. (*see* Chapter 3, Section B.2(e) and Chapter 6, Section C.3).

- The activities addressed under an HCP may be subject to Federal laws other than the ESA, such as the Coastal Zone Management Act, Archeological Resource Protection Act, and National Historical Preservation Act. Service staff should check the requirements of these statutes and ensure that Service responsibilities under these laws, if any, are satisfied, and that the applicant is notified of these other requirements from the beginning. The Service's staff should, to the extent feasible for all HCPs other than low-effect HCPs, integrate analysis done in compliance with other environmental and cultural review requirements into the NEPA analysis prepared for the proposed HCP.

- Work with the permit applicant in good faith but ensure that the HCP established clearly measurable and enforceable compliance standards, including written documentation of all applicable biological results.

- Once an incidental take permit has been issued, monitor permit compliance, and make sure monitoring activities are conducted and monitoring reports are submitted as defined by the HCP. Develop a tracking and accountability system for issued permits. Report all violations of permit

conditions to the appropriate law enforcement personnel.

CHAPTER 3

PRE-APPLICATION COORDINATION AND HCP DEVELOPMENT

Congress intended the HCP process to be used to reduce conflicts between federally listed species and non-Federal development and land use, and to provide a framework for "creative partnerships" between the public and private sectors in endangered species conservation. Congress also intended the FWS and NMFS to be not just regulators of the HCP program, but active participants in providing technical assistance, and that "comprehensive" HCPs could be developed jointly by the FWS, NMFS, the private sector, and local, slate, and Federal agencies, with the Services as a technical advisor (H.R. Rep. No. 97-83, 97th Congress, Second Session).

This chapter discusses the Services' roles in the HCP process during the pre-application and HCP development phase. From a technical standpoint, this involves advising the permit applicant on the biological needs of the species involved, statutory HCP requirements and permit issuance criteria, NEPA requirements, and other technical issues.

The Services also have an important "leadership" role to play in the HCP program, which involves not only technical expertise but attitude and philosophy. Although FWS or NMFS typically do not initiate HCP efforts, they can and should encourage them and once initiated support them to the maximum extent possible. This means being actively involved during HCP development; providing advice on mitigation programs, monitoring measures, and reserve designs; providing timely review of draft documents; helping

find solutions to contentious issues; and generally helping bring the HCP together.

A. Getting Started

Once a private or non-Federal entity (or entities) has decided to obtain a section 10(a)(1)(B) permit the first task that it needs to undertake are determining the appropriate applicant, deciding whether or not to establish a steering committee, and preparing a list of species to be addressed in the HCP.

1. *Who Can Apply For a Section 10 Permit?*

Section 10 permits can be issued to state, municipal, or tribal governments, corporations or businesses, associations, and private individuals. They can also be issued to entities that are a combination of these, such as joint power authorities, watershed councils, and other planning authorities.

The standard method of authorizing take for Federal agencies is through the section 7 consultation process. Actions authorized, funded, or carried out by Federal Agencies must go through the section 7(a)(2) consultation process. There are cases where a Federal agency is a partner in an HCP, and has a minor, but integral role in the HCP. Examples of these types of HCPs would include HCPs where a Federal agency is involved in a cooperative planning effort in which both Federal and private lands are addressed under a single HCP but the Federal agency is not the applicant or the primary partner in the plan. In these cases, the specific identified actions to be conducted by the Federal agency during the implementation of the HCP should be consulted on as part of the section 7 consultation conducted for the HCP. This allows the Services to conduct one formal consultation that incorporates the actions for the HCP and any specified or identified cooperative Federal action into one biological opinion. The biological opinion developed for the HCP should also incorporate the necessary biological analysis on

the Federal action as well as the actions in the HCP to help eliminate duplication. Thus, the single biological opinion issued by the Services would address both the Federal action and the non-Federal action, and it would include an incidental take statement that authorizes any incidental take by the Federal agency and an incidental take permit that authorizes any incidental take by the section 10 permittee.

Before processing a section 10 permit application involving a Federal agency, Service staff should consult with the appropriate Regional Director's or Solicitor's Office (FWS}, or the Regional Director's Office or Washington, D.C. Office of Protected Resources Office (NMFS).

2. *Determining the Appropriate Applicant.*

The first step is to determine who the applicant is who ultimately will hold the permit. In many cases this is relatively straightforward—the applicant is the land or other natural resource owner who proposes the project or activity and is responsible for implementing the HCP.

In regional HCPs, the plan often relies upon local or regional authorities to implement the plan and regulate the taking of listed species addressed in the plan. The permittee must therefore be capable of overseeing HCP implementation and have the authority to regulate the activities covered by the permit. For large-scale planning efforts involving only one or two landowners or types of activities, the landowners themselves are usually the appropriate permittee. For planning efforts involving numerous property owners and activities, the permittee is usually a local public agency—e.g., a city or county government or several local agencies acting jointly. In other cases, a state agency may obtain and hold a section 10 permit for certain types of state-regulated private activities (e.g., forestry activities).

When no government agency is available or interested in assuming the responsibility for an HCP, private groups

wishing to obtain a permit for large-scale or multi-faceted projects may initiate an HCP without government involvement. They may, for example, form a consortium to develop the HCP, in which case the consortium would be-the permittee. Or, the may jointly fund development of the HCP but maintain their individual identities by applying for separate permits, using the same HCP or individual HCPs modified from a jointly-developed "template." Either approach is acceptable so long as the permittees have the authority to regulate or control all or applicable parts of the HCP program and the conditions of the HCP are enforceable.

3. *Steering Committees*

An HCF "steering committee" is a group of persons who represent affected interests in a broad-scale HCP planning area and generally oversee HCP progress and development. Steering committees are not required by law and the Services do not require them, although they have proven useful to applicants in a variety of HCP settings. However, the Services cannot be the entities which establish them without compliance with the Federal Advisory Committee Act. It is important to remember that a steering committee s purpose is to advise the applicant in the development of the HCP, not to advise the Service on permit issuance.

The steering committee approach may not be appropriate for all situations. For some applicants, it may be too formal or complicated, or they may view it as giving "outside interests" too much access to proprietary data involving private lands. If this is the case during the pre-application phase, the Services should encourage the applicant to provide opportunities to brief or inform representatives of interested parties of key elements or issues to be addressed in the proposed HCP. This can be accomplished in several ways, such as formal or informal meetings, newsletters, etc.

When used in the HCP process, steering committees are usually appointed by the permit applicant and can fulfill several roles—they can .assist the applicant in determining the scope of the HCP size of the planning area, activities to include, etc.), help, develop the mitigation program and other HCP conditions, provide a forum for public discourse and reconciling conflicts, and help meet public disclosure .requirements. Steering committees are particularly useful in regional HCPs, especially those in which the prospective permittee is a state or local government agency, and are recommended for these types of HCP efforts. However, they are generally not utilized for low-effect HCPs or most single landowner projects.

Ideally, a steering committee should include representatives from the applicant; state agencies with statutory authority for endangered species; state or Federal agencies with responsibility for managing public lands within or near the HCP area (including other Service program areas such as the FWS's Refuges Division); tribal interests where applicable; affected industries and landowners (especially those with known or possible endangered species habitats); and other civic or non-profst groups or conservation organizations with an interest in the outcome of the HCP process.

For regional HCPs it is not practical to include *every* affected landowner or interest group steering committee. Instead, industry groups should be encouraged to assign a professional or trade organization to the committee to represent them—e.g., a farm bureau, cattlemen s association, or building Industry association--though corporations with extensive land holdings in the plan area may want to represent themselves. The steering committee needs to be representative, but its size must be manageable.

Another way to control numbers of participants in the HCP process is by using sub-committees. Sub-committees act as

small working groups on behalf of the main committee and are an excellent means of addressing specific issues and developing specific components of the HCP. Sub-committees are more efficient than the larger steering committee for conducting certain tasks and generally help move the HCP process forward.

Prior to initiating an HCP effort, the newly-appointed steering committee may elect to develop a Memorandum of Understanding (MOUE or similar document to record "up front" the goals of the HCP, the composition of the committee, expectations of HCP participants, and other information unique to the locality or defined by the committee. Appendix 3 shows the MOU developed by participants of the Kern County, California HCP.

The question of whether to establish a steering committee may be difficult for non-governmental applicants. State or local governments typically embrace the steering committee idea early in the process because of their desire to obtain consensus from the community. On the other hand, private landowner applicants may feel that creation of a steering committee will lead to confrontation or the intrusion of outside interests into proprietary or sensitive economic matters. However, applicants should be aware of the potential benefits of a steering committee. These include identification and resolution of issues before they cause delays later in the process, development of an HCP that enjoys greater support in the community, and the cooperation of agencies or private conservation organizations that may be needed to help implement the conservation program. Permit applicants ultimately must weigh the risks of establishing or not establishing a steering committee with the expected benefits.

For large-scale or regional HCPs, one of the main functions of the steering committee is to build consensus among diverse organizations and interests, so it is important to promote good working relationships among committee participants. This

does not mean that reaching agreement in complex HCP efforts will be easy! Often it is not. However, development of the HCP will be most effective when all interests in the community are represented in steering committee activities and their views and needs are given a fair hearing. A few suggestions:

- Steering committee meetings should be open to the public. This allows interested persons who do not actually sit on the committee to attend meetings, monitor progress, and generally feel they are part of the process.

- HCP participants should avoid creating an impression that they are pursuing unstated agendas or negotiating in bad faith. The trust developed between diverse and sometimes antagonistic HCP participants can be fragile, and this impression can be damaging to a productive HCP even if untrue. Participants need to be sensitive to *preception* and avoid the impression of bad faith.

- The FWS and NMFS should not assign inexperienced staff to provide technical assistance to large-scale or regional HCP steering committees. This can result in mistakes, lost opportunities, and suggests to the applicants that the agencies-are disinterested in the planning process inexperienced staff should learn the HCP process by working on small HCPs and by assisting other staff on larger efforts. If no staff have specific HCP experience, then individuals who are otherwise seasoned FWS or NMFS professionals should be assigned. If such individuals are not available, other staff should be sent to monitor HCP progress but not to actively participate. In such cases, staff sent to monitor the HCP should make clear to the applicants the limitations of their participation and resist rendering advice on important issues. However,

they can and should act as Liaisons to more experienced staff in the Field Office in answering questions or obtaining advice.

- The composition of the steering committee will depend on the type of HCP involved. Regional HCPs involving numerous activities and in which the applicant is a government entity ideally should include representatives from all affected interests. Steering committees for non-government HCPs can be organized according to the specific needs of the applicant, but at the least should include representatives from each permit applicant.
- A good facilitator or consultant who is skilled at moderating committee meetings, building consensus, and handling uncooperative parties can help significantly to move the HCP process forward.

4. *The Services' Roles on Steering Committees & HCP Efforts.*

Neither the FWS nor NMFS is required by statute or regulation to serve on HCP steering committees. Nevertheless, it is strongly advised that section 10 applicants invite the Services to participate as technical advisors on their steering committees. This will help ensure that adequate biological standards are incorporated into the HCP and that the HCP and associated documents meet procedural requirements when the permit application is submitted. An HCP prepared in the absence of Service technical participation could be judged inadequate late in the process and unnecessary delays could result. The same caveat applies to all HCPs, regardless of size or whether a steering committee is established.

However, a careful balance needs to be drawn between constructive Service involvement in HCP efforts and overly aggressive involvement. Too little involvement can leave the

impression that FWS or NMFS are disinterested or unhelpful, while too much can create the perception that the Services are inflexible in their approach to the HCP process, rigidly dictating the mitigation program.

To avoid either impression, Service HCP representatives need to understand their role and make that role clear to the applicant and the steering committee. Their function as agency representatives is to provide guidance about statutory and policy standards and, to help facilitate development of a suitable mitigation program that satisfies the requirements of section 10; it is :not to dictate every element in the HCP. The option to ignore or modify Service recommendations remains with the applicant; of course, doing so might result in subsequent difficulties during the permit application processing phase and the disapproval of an inadequate HCP: Service representatives at the Field Office level cannot pre-approve an HCP because section to permits are issued by the Regional Office (or, for NMFS, the Washington, D. C. Office), and, although advance coordination between the Field and Regional Offices should ensure their agreement on the HCP's adequacy, the permit application must still be evaluated fully during the public comment period.

The Services' steering committee members should also abstain from formal voting procedures on HCP issues if the committee conducts such votes. This will prevent confusion and reinforce the Services' proper role as advisor. Until the HCP is completed and submitted for approval, specific HCP development decisions are up to the steering committee and the applicant.

During the HCP development phase, the Services should be prepared to advise section 10 applicants on the following (regardless of whether there is a steering committee):

- Preparing the species List and identifying project scope and impacts.

- Biological studies and data needed to assess project impacts;
- NEPA requirements and the applicant's potential role in developing the NEPA analysis.
- Applicability of state endangered species law and requirements, and any other Federal laws that may be applicable, if any.
- Project modifications that would minimize take and reduce impacts, or, ideally, and with concurrence of the applicant, would generate an overall measurable net benefit to the affected species;
- Design of mitigation, habitat enhancement, or mitigation programs;
- Reserve design criteria and assistance in population viability assessments, if desired.
- Methods for monitoring HCP progress and project impacts on affected species;
- Biologically acceptable take limits and how to define them;
- Criteria to track or determine success of the HCP; and,
- Procedural and other HCP issues as requested by the committee.

5. *Preparing the HCP species List.*

In many HCPs, there are one or two primary species that "trigger" the need for an incidental take permit (e.g., the northern spotted owl or salmon in the Pacific Northwest, desert tortoise in southwestern deserts, or red-cockaded woodpecker in the southeast), though other listed species may occur in the same planning areas. After the decision has been made to obtain a permit, one of the first decisions an HCP applicant must make is what species to address in the plan.

Generally, permit applicants should be advised to include all federally listed wildlife species likely to be incidentally taken during the life of the project or permit. If the applicant does not address such species, it may not be possible to issue the permit (if the issuance of a more limited permit would violate section 7(a)(2) for the listed species not covered) or the project activities could be stopped or delayed after the permit has been issued if a listed species that was not addressed in the HCP is likely to be taken during project activities.

There are also advantages in addressing unlisted species in the HCP (proposed and candidate species as a minimum), particularly those that are likely to be listed within the foreseeable future or within the life of the permit. Doing so can protect the permittee from further delays—e.g., having to revise the HCP and amend the permit--should species that were not listed at the time the original HCP was approved subsequently become listed. In addition, the "No Surprises" policy (*see* below, Section B.5(a)), applies to listed as well as unlisted species if they are adequately addressed in the HCP.

The more species addressed in the HCP, the more potentially complicated the HCP may become. For example, inmost state systems, primary jurisdiction over candidate species rests with the affected State fish and wildlife agency, thereby increasing the advisability of that agency's participation in the HCP process. Thus, selecting the species list can become an exercise in balancing the need to obtain maximum regulatory certainty, with practical considerations such as manageability, availability of biological information, and cost. The Services should be prepared to advise the applicant about which listed species should be highest priority in the HCP, which unlisted species are most likely to be listed in the future, and which species, listed or unlisted, can otherwise be advantageously addressed in the HCP. Ultimately, the decision about what species to address in the HCP lies with the applicant. In any case, the species list

should be developed and agreed upon early in the HCP process, since it forms much of the basis for future plan development.

When preparing the species List the applicant should be informed that the ESA generally does not prohibit the incidental take of federally listed plants. Nevertheless, the Services should encourage the applicants to consider including listed plants in HCPs because, although incidental take of plants may not be prohibited by section 9, the section 1(a)(2) prohibition against jeopardy does apply to plants. If the section 7 consultation on a section to permit application concludes that issuance of the HCP permit for wildlife species would jeopardize the existence of a listed plant species, the permit could not be issued. To 2void this outcome, the applicant should ensure that .actions proposed in the *HCP are not* likely to jeopardize any federally listed plant species. In addition, not ail species under the jurisdiction of NMFS listed as threatened are subject to the section 9 take prohibitions. Such prohibitions are applied through regulation, on a case-by-case basis. Therefore, an incidental take permit may not be required for these species. Specific regulations are provided at 50 CFR Part 227.

6. *Involving Other Federal and State Agencies.*

During the development stage of an HCP, the Services will provide technical assistance and information concerning regulatory and statutory requirements to the applicants to ensure completeness of the application. Throughout this developmental process, the Services will encourage applicants to invite and include other Federal and State agencies who can utilize their existing authorities, expertise, or lands, in support of the HCP development and implementation process. It is particularly important to encourage participation of other Federal and State agencies that manage nearby lands into the HCP development process, if the applicant is willing to do so. However, the Service must

ensure that activities are not identified in the HCP that obligate other agencies to conduct mitigation or minimization activities for species covered by the HCP, unless specifically negotiated with the agency, and the agency was, a partner in the development and implementation of the HCP.

The "No Surprises" policy, which provides the applicant with regulatory certainty, calls for the Services to assist with correcting any unforeseen circumstance that may arise. This means that in the face of unforeseen circumstances the FWS and NMFS will not require additional mitigation in the form of additional lands or funds from any permittee who is adequately implementing or has implemented an approved HCP. Once the permit is issued and its terms are being complied with, the applicant will not be required to accept additional obligations of this type. The policy also protects the permittee from other forms of additional mitigation except in cases where "extraordinary circumstances" exist.

The Services can, however, encourage other Federal or State agencies to assist with any unforeseen circumstances. Other agencies will be better able to assist if they have been involved throughout the entire HCP development. Any Federal or State agency that could ultimately be affected by the implementation of an HCP will be notified during the developmental process, and once the HCPs are completed and the incidental take permit is issued the Services will provide copies to the affected agencies. This will help these agencies effectively manage their lands in a way that could support the HCP and promote the conservation and recovery of listed and unlisted species.

7. *Treat Rights and Trust Responsibilities.*

A unique and distinctive relationship exists between the United States and Native American Tribes, as defined by treaties, executive orders, statutes, court decisions, and the United States Constitution. This relationship differentiates

tribes from other entities that deal with, or are affected by, the Federal government.

Indian tribes are recognized under Federal law as separate sovereigns with governmental rights over their lands and people. These governmental rights and authorities extend to natural resources that are reserved by or protected in treaties, executive orders, and Federal statutes. Such reserved rights may include off reservation rights to hunt, fish, or gather trust resources.

The United States has a Federal trust obligation towards Indian tribes to preserve and protect these rights and authorities. The Federal Indian trust responsibility is a legally enforceable fiduciary obligation, on the part of the United States, to protect tribal lands, assets, resources, and treaty rights, as well as a duty to carry out the mandates of Federal law with respect to American Indian tribes and Alaskan Natives.

During habitat conservation planning negotiations with non-Federal landowners, the Services must consider whether proposed plans might affect tribal rights to trust resources. Whenever the Services have a~ reasonable basis for concluding that such effects might occur, they must notify the affected tribes and consult government to government in a meaningful way. Consultation with the affected tribe shall be completed within a timely manner. After careful consideration of the tribe's concerns, the Services must clearly state the rationale for the recommended final decision and ex lain how the decision relates to the government s trust responsibilities. In light of this obligation, it is important that the Services identify and evaluate during the planning process, any anticipated effects of a proposed HCP upon Indian trust resources.

B. Developing the HCP

1. *Mandatory Elements of an HCP.*

Under the Endangered Species Act [Section l0(a)(2)(A)] and Federal regulation [50 CFR 17.32(b)(1), and 222.22], a conservation plan submitted in support of an incidental take permit application must detail the following information.

- Impacts likely to result from the proposed taking of the species for which permit coverage is requested;
- Measures the applicant will undertake to monitor, minimize, and mitigate such
- Alternative actions the applicant. considered that would not result in take, and the reasons why such alternatives are not being utilized; and,
- Additional measures FWS or NMFS may require as necessary or appropriate for purposes of the plan.

Each of these conservation plan elements are discussed in detail in the sections below. NMFS regulations (50 CFR 222.22) also require a List of all sources of data used in preparation of the plan.

Section 10 HCP requirements and permit issuance criteria must be clearly explained to any prospective permit applicant at the outset of an HCP effort. This is essential to ensure that the applicant understands the HCP process and that the HCP is developed within required legal parameters.

2. *Identifing Project Impacts.*

Four subtasks must be completed to determine the likely effects of a project or activity on federally listed or candidate species: (a) delineation of the HCP boundaries or plan area; (b) collection and synthesis of biological data for species to be covered by the HCP;. (c) identifying activities proposed in the plan area that are likely to result in incidental take; and (d) quantifying anticipated take levels. To help expedite the

section 7 process, the HCP should also assist the Services in: (e) satisfying the requirements of section 7 of the ESA; (f) addressing significant indirect effects of the project on federally listed species, if any; (g) addressing jeopardy to federally listed plants, if anticipated; and (h) addressing effects on critical habitat, if any. Section 1 should be addressed as early as is practicable in the HCP, development process.

a. *Delineation of HCP Boundaries*. HCP boundaries should encompass all areas within the applicant s project, land use area, or jurisdiction within which any permit or planned activities likely to result in incidental take are expected to occur. HCP boundaries should also be as exact as possible to avoid later uncertainty about where the permit applies or where permittees have responsibilities under the HCP. For low-effect and many other HCPs, the Ian area is usually synonymous with the project or land use site or the landowner's property. Far regional HCPs, the size and configuration of the plan area will depend on various factors. Sometimes a regional HCP boundary will simply be a county line because a county government is the applicant. In other cases, it will be drawn to deliberately include or exclude certain areas or activities, depending on the participants' objectives [*see* Section B.2(c) below].

Generally, HCP applicants should be encouraged to consider as large and comprehensive a plan area as is feasible and consistent with their land or natural resource use authorities. Regional and other large-scale HCPs allow the permittee to address a broad range of activities and to bring them under the "umbrella" of the permit's legal protection. They also allow analysis of a wider range of factors affecting listed species, maximize flexibility needed to develop innovative mitigation programs, and minimize the burden of ESA compliance by replacing individual project review with comprehensive, area-wide review.

On the other hand, considering a large and complicated planning area has its own potential difficulties. Attempts to satisfy too many Land use or endangered species issues in one effort can be frustrated by excessive complexity, shortages of biological information, and difficulties in securing the consensus of HCP participants. However, these are judgment calls, and the final size and configuration of an HCP planning area will often be a compromise between the need to be as comprehensive as possible and the inherent risks of an over-extended, protracted HCP effort.

Regional HCPs sometimes can be simplified by dividing the planning area into separate planning units with different conditions and requirements for each area. This approach was adopted in the San Bruno Mountain HCP. Coordination with individual landowners and local land use authorities will help determine when subdivision of a plan area will yield substantial advantages.

In any case, neither the ESA nor its implementing regulations limits the size of an HCP planning area. No matter how large or small, HCP areas are acceptable so long as the HCP is statutorily complete and meets the section 10 issuance criteria with respect to small projects, the FWS section 10 regulations state that, "The Service believes that Congress did not intend to exclude projects from the incidental take provisions of section 10(a) merely because the projects were of more limited duration or geographical scope [than the San Bruno Mountain HCP]" (50 FR 39681-39691).

The HCP plan area might also include areas necessary for the mitigation. The exception to this general rule may be where the mitigation consists of reserves apart from the area in which incidental take is authorized. This will entail various considerations--e.g., the distance from permitted activities to reserve areas (see below, Section B.2(c)) and the ability of the permit applicant or its designee to regulate activities inside the reserve. Private; state, or locally-owned lands should

never be considered for inclusion in HCPs as reserves without the concurrence of the landowners or their representatives.

b. *Collection and Synthesis of Biological Data.* Preparing an acceptable HCP requires the availability of up-to-date biological information on the species being considered within the plan area. First, the applicant should collate and review existing information about species distribution, occurrence, and ecology. FWS or NMFS can assist in this process by directing the applicant to available information. Second, the applicant should determine whether the available information is adequate to proceed with the planning process. If not, FWS or NMFS should recommend the type, scope, and design of biological studies that can reasonably be developed to support the HCP. However, research efforts on behalf of an HCP should be confined to distribution studies or other studies with a direct bearing on the needs of the HCP. Permit applicants should not be expected to undertake studies that do not directly affect the outcome of the HCP. Determining the availability of existing information is especially important for regional HCPs, since they may involve species whose biology is not well known. Low-effect HCPs typically will not require additional studies beyond surveys needed to determine the distribution of the species within the plan area.

Another approach to consider for HCPs is habitat-based HCPs (*see* Chapter 3, Section C.1) in which the presence of a particular species can be assumed based on the presence of its habitat type; if that habitat type is then addressed in the HCP and included in the mitigation program, additional distribution studies may not be necessary.

c. *Determination of Proposed Activities.* The applicant should be encouraged to include in the HCP a description of all actions within the planning area that: (1 }are likely to result in incidental take; (2) are reasonably certain to occur over the life of the permit; and (3) for which the applicant or landowner has some form of control. For many HCPs, this

will usually involve a specific well-defined project (e.g., home construction; water use development} or land use activity (e.g., forestry}. For regional and other large-scale planning efforts, the applicants will need to determine what activities they wish to include in the HCP and, if necessary, which ones they wish to exclude. Generally, applicants should be encouraged to include as comprehensive a set of activities in the HCP as is practicable. This will maximize the permittee's long-term planning assurances, broaden legal coverage, and minimize the possibility that some future activity will not be covered by an issued permit.

What is being authorized in a section 10 permit is incidental take, not the activities that result in the take. Similarly, a violation of the permit occurs only if the amount or extent of authorized take is exceeded or if the terms and conditions of the HCP or the permit are not implemented, not necessarily because some unspecified activity has occurred. The legality of an incidental take occurring during a specific activity will depend on how the HCP is structured. In some regional HCPs, the permit may specify that a certain number of habitat acres may be modified during construction activities, but the specific types of construction are unspecified--in which case the construction type *per se* would not affect the legality of an}t resulting incidental take. However, other HCPs may analyze incidental take in the contest of a specified activity to be conducted across the HCP area, such as forest management. In such cases, incidental take is only authorized in association with specifically analyzed activities.

Even in the former case, an activity type that is not implicitly or explicitly covered by an HCP should not be allowed to "use" portions of the incidental take authorization at the expense of activities that are described. Unless broadly defined types of activities are described in the HCP (e.g., timber harvest, agriculture, or construction activities), then

incidental take occurring during such activities within the plan area generally would not be authorized. In any case, the specificity with which activities are described in the HCP will depend on the applicant's objectives. They should be sufficiently described (as included or excluded) that the permittee or landowners subject to the permit can determine the applicability of the incidental take authorization to the activities they undertake.

Determining appropriate activities to include in the HCP can involve the same considerations as those described in Section B.2(a) concerning the HCP boundary. Here again the desire for a comprehensive HCP must be balanced against the risk of over-complicating the plan. Also a factor is the willingness of any particular group to participate in the HCP process. No group can be forced to participate. *Of course, not participating in the responsibilities of the HCP also means not enjoying the benefits of protection from the incidental take prohibition and regulatory streamlining.*

In some cases, specific landowners or industries may be reluctant to become involved in the HCP process. In such cases, Service representatives should assist the remaining participants in good faith, while encouraging "sideliners" to observe the benefits of the program. Of course, "non-participants" should understand that if their activities are not addressed in the HCP, either specifically or generically, they will not be covered by the incidental take permit. Moreover, if the permit applicant is a state, regional, or local governmental agency, "non-participants" may ultimately be affected by the terms and conditions of an HCP once the permittee begins to implement the HCP through the exercise of its regulatory powers. In other cases, a landowner may elect not to participate in an HCP for other reasons--for example, if they are negotiating a separate agreement or are operating under an existing permit.

These factors can result in HCPs with unusual inclusions and exclusions. For example, in the Metropolitan Bakersfield HCP in California, oil development activities are specifically excluded from the planning area but are proposed for inclusion in the Kern Count HCP which overlays the Bakersfield HCP (*see* Appendix 3). Sometimes a new HCP will overlay multiple existing HCPs, or some applicants may elect to pursue an HCP on their own even though a regional HCP is being developed in the same area. Also, more than one regional HCP may occur near each other within the same bio-regional province, or two such HCPs may occur within the ranges) of the same species. Such inclusions and exclusions are perfectly acceptable. Nevertheless, participants should be aware of coordination problems that can develop between HCPs in these types of cases. For example, it is important to ensure that mitigation programs for the same species are identical in adjacent HCPs. Also, the Services should not issue more than one permit for identical activities in the same area at the same time, since this could result in two differing sets of conditions for the same activities. Incases where a new HCP overlays an existing one, neither the Services nor the new permit-holder can force existing permittees to adopt conditions of the new permit without their consent—(however, there may be exceptions, such as when the new permittee is a state or local government with its own regulatory authority}. Generally, however, the Services will not seek additional mitigation from existing HCP permit holders for the same activities affecting the same species under a broad regional plan.

d. *Determining Anticipated Incidental Take Levels.* In determining the amount of incidental take that will be authorized during the life of the permit, three things must be determined: (1) how incidental take will be calculated; (2) the level of incidental take and related impacts expected to result from proposed project activities; and (3) the level of

incidental take chat the section 10 permit will actually authorize.

The first depends on the ability of HCP participants to determine, to the extent possible, the number of individual animals of a covered species occupying the project or land use area or the number of habitat acres to be affected. Depending on this information, proposed incidental take levels can be expressed in the HCP in one of two ways; (1) in terms of the number of animals to be "killed, harmed, or harassed" if those numbers are known or can be determined; or (2) in terms of habitat acres or other appropriate habitat units (e.g., acre-feet of water} to be affected generally or because of a specified activity, in cases where the specific number of individuals is unknown or indeterminable. The latter is typically expressed as all individuals occupying a given area of habitat, in whatever habitat unit is being used.

The next aspect depends on the number of animals or habitat units that-occur in the project or planning area, and the likelihood that any given activity will result in take. This can be determined by first "overlaying" data on proposed activities—often in the form of maps—with biological data compiled from existing sources and collected in the field by the applicant when this is completed, the effects of particular activities on species occupying project areas can be analyzed.

Under Federal regulation (5O CFR 17.3), "harm" in the definition of take can include "significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding, or sheltering." Therefore, habitat modification or destruction, to the extent the above effects occur, can constitute take and must be detailed in the HCP and authorized by the permit. "Harassment" is defined by regulation as "an intentional or negligent act or omission which creates the likelihood of injury to wildlife by annoying it to such an extent as to

signifcantly disrupt normal behavioral patterns which include, but are not limited to, breeding, feeding, or sheltering." As with "harm," any action qualifying as harassment under this definition must be described in the HCP and authorized by the permit (*see* Chapter 7, Section B.1).

After expected take levels have been estimated based on a comparison of proposed activities with species distribution in the plan area, the applicant and the Services can begin to determine the final outcome of the HCP. In general terms, this is done by determining what incidental take levels can be authorized that are *consistent* with the section 10 issuance criteria (i.e., that will not "appreciably reduce the likelihood of the survival and recovery of the species in the wild"), and developing a miti[g]ation program that is also consistent with the issuance criteria (i.e., that will minimize and mitigate "to the maximum extent practicable"). If, in the Services' judgment, *initially anticipated* incidental take levels exceed what can be permitted under the section 10 issuance criteria, additional take avoidance and other mitigation measures must be developed.

These processes—determining anticipated incidental take, development of the mitigation program, and establishing authorized incidental take levels—are dynamic and do not necessarily occur in consecutive order as the above description might infer.

e. *Coordinating the HCP With Section 7 of the ESA.* Section 7(a)(2) of the ESA requires all Federal agencies "in consultation with and with the assistance of the Secretary" to ensure that "any action authorized, funded, or carried out by such agency is not .likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification" of designated critical habitat. The section 7 implementing regulations (50 CFR Part 402) require, among other things, *analysis of the* direct and indirect effects of a proposed action,

the cumulative effects of other activities on listed species, and effects of the action on critical habitat, if applicable.

Consultation under section 7 of the ESA is the Federal agency's responsibility, not the applicant's. In the case of issuance of a section 10 (a)(1)(B) permit FWS or NMFS must conduct an intra-Service (or internal} consultation to ensure compliance of permit issuance with the provisions of section 7. However, although the consultation responsibilities is not the permit applicants, the applicant should help ensure that those considerations required of the Services by section 7 have been addressed in the HCP. Otherwise, the Services' section 7 consultation on proposed permit issuance might result in a jeopardy or adverse modification finding with respect to indirect or cumulative effects, listed plants, or critical habitat if the HCP has inadequately considered these issues.

However, despite these additional considerations, inmost cases the applicant will not actually experience a significant increase in responsibilities under the HCP because of the Services' associated section 7 responsibilities. This is because there are relatively high thresholds under section 7 (i.e., jeopardy), and many of the same relevant biological considerations are already integrated into the HCP process [*see* Sections B 2(f)-(h) below].

In many cases, the procedural aspects of the section 1 consultation are more important to the applicant's interests than its substantive outcome. In the past, some have viewed the section 7 consultation for a section 10(a)(1)(B) permit as an independent review process that occurs after the HCP has been prepared and during the permit application processing phase. However, this approach left the permit applicant with no guarantee that the process of meeting the requirements of section 10(a)(1)(B) would result in issuance of the permit, since a section 7 consultation conducted late in the process could result in the discovery of unresolved issues, the return

of an inadequate HCP to the applicant, or a jeopardy biological opinion.

To avoid this it is now Service policy to begin integrating the section 7 and section 10 processes from the beginning of the HCP development phase and to regard them as concurrent and related, not independent and sequential processes.

In procedural terms, this means that considerations of section 7 consultation requirements should start at the beginning of the HCP development phase, not during the permit processing phase. It also means that if the Services and the applicant work together to develop an adequate HCP—one that meets the section 10 issuance criteria as well as the Services' applicable section 7standards—then a "no jeopardy" biological opinion at the close of the section 7 consultation should be virtually assured. Service representatives should explain to HCP applicants at the outset of any HCP effort the Services' section 7 obligations, how those obligations affect the applicant, and how the two processes (sections 7 and 10) will be integrated.

f. *Addressing Indirect Project Effects.* In some cases, it may be determined that activities being considered in an HCP would be likely to result in indirect effects to listed species. The implementing regulations of section 7 of the ESA define indirect effects as "those that are caused by the proposed action and are later in time, but still are reasonably certain to occur." In the HCP context, .this would typically mean that activities under the HCP are expected to affect species outside the HCP plan area, or species that are inside the plan area but are not otherwise directly covered by the terms of the HCP: If expected indirect effects are serious enough to result in jeopardy or result in adverse modifications to critical habitat, and they have not been adequately treated in the HCP, the Services would have to deny the permit. Thus,

indirect effects issues must be treated carefully during any HCP negotiation process.

From a practical standpoint, one problem is that large-scale projects of the type addressed in many HCPs can have "ripple" effects that continue long past their point of origin. Following a causation chain of indirect effects from their point of origin to some specific effect, or vice versa, can be difficult, and assigning responsibility for all potential subsequent effects to *the originator of a particular action may not be justified or practical.* Far example, some species addressed in HCPs occupy small habitat areas or have narrow habitat requirements and are therefore unusually vulnerable to biotic and abiotic factors such as fire, vegetation succession, predation, and interspecific competition. In these cases, human alteration of the landscape in and around such *habitats can* have heightened adverse effects or specific indirect effects that must be addressed if the habitats are to be considered viable and affected populations are to persist. A good example is development in endangered beach mice habitat, tivhich results in increased pet populations and then increased predation on beach mice. The HCP in such cases must address these types of effects. In the southeast, for example, some approved HCPs have been predicated on the successful control of post-project, human-induced effects on endangered species populations that remain or are protected after development of adjacent areas. Permittees have agreed to provide funding to control predators and competitors of listed species, nuisance or exotic vegetation, or pollution, and to meet education and information needs in the local community.

With these considerations in mind, the following guidance is provided about how to address indirect effects issues in HCPs. If a species is likely to be jeopardized as a result of the indirect effects of activities proposed in an HCP, the Services may not issue the permit unless these effects are adequately

addressed. However, before an HCP is required to contain additional requirements to adequately address indirect effects under section 7: (1) the risk of jeopardy should be clear and reasonably certain to occur; and (2) the indirect effects in question must be reasonably foreseeable and a proximate consequence of the activities proposed under the HCP. The standard for imposing additional requirements on an HCP is the likelihood of jeopardy, not just the existence of indirect effects.

g. *Consideration of Plants in the HCP and Permit.* The take prohibition for federally listed plants under the ESA is more limited than for listed animals. Section 9(a)(2)(B) prohibits)the removal of listed plants or the malicious damage of such plants on areas under Federal jurisdiction, or the destruction of listed plants on non-Federal areas in violation of state law or regulation. Thus the ESA does not prohibit the incidental take of federally listed plants on private Lands unless the take or the action resulting in the take is a violation of, state law which in most cases eliminates the need for an incidental take permit for plants).

Nevertheless, the Services recommend that permit applicants consider listed plants in HCPs. This is because the section 7(a)(2) prohibition against jeopardy applies to plant as well as wildlife s ecies; and if the section 7 consultation on a section 10 permit application concludes that issuance of the permit for wildlife species would jeopardize the existence of a listed plant species, the permit could not be issued. To avoid this outcome, the applicant should ensure that actions proposed in the HCP are not likely to jeopardize any federally listed plant species.

However, if it is determined that the proposed HCP is not likely to jeopardize the continued existence of any federally listed plant species, then any such plants present within the HCP area that are on private or other non-Federal lands are protected against incidental take only to the extent that state

law applies. Beyond that the applicant has no further responsibility with respect to listed plants. In the spirit of the conservation planning process, however, the Services will encourage applicants to address endangered or threatened plants in their HCPs.

Although take of listed plants does not require a section 10 permit in most cases, the names of any plants addressed in the HCP can be placed on the permit at the request of the applicant when it is issued. This might be done: (1) because a particular plant is protected by state law and is subject to the section 9 take prohibition; or (2) to protect the permittee's interests should the legal status of any plant change during the life of the permit as a result of changes to the ESA. This approach is acceptable and is encouraged if the permit applicant requests it or it otherwise increases the applicant's confidence in the long-term assurances under the permit. It is also consistent with the treatment of unlisted wildlife species in section 10 permits as described in Chapter 4.

h. Addressing Effects an Critical Habitat. Section 7(a)(2) prohibits the "destruction or adverse modification" of designated critical habitat by any action authorized, funded, or carried out by a Federal agency.. The section 7 regulations define "destruction or adverse modification" as "a direct or indirect alteration that appreciably diminishes the value of critical habitat for both the survival and recovery of a listed species." The regulations for section 4 of the ESA (50 CFR 424.12) describe the "constituent elements" of critical habitat as "those that are essential to the conservation of the species" including, but not limited to, "roost sites, nesting grounds, spawning sites, feeding sites, seasonal wetland or dryland, water quality or quantity, host species or plant pollinator, geological formation, vegetation type, tide, and specific soil types."

Thus, in issuing section 10 permits, the Services must ensure that the constituent elements of critical habitat will not be

altered or destroyed by proposed activities to the extent that the survival and recovery of affected species would be appreciably reduced. However, these section 7 obligations typically impose few restrictions on the HCP applicant in addition to those required by section 10, because the section 10 issuance criteria also prohibit appreciably reducing the "likelihood of the survival and recovery of the species in the wild" [section 10(a)(2)(B). In other words, the inherent biological value of areas designated as critical habitat typically would prevent significantly greater alteration of their constituent habitat elements under section 10 than would be permissible under section 7. Nevertheless, to the extent that a proposed HCP might result in impacts to critical habitat, such impacts should be described and evaluated in the biological opinion concluding section 7 consultation on the permit application.

Some HCPs encompass areas that have been or have the potential to be designated as critical habitat. To fulfill the Service's section 7 compliance responsibilities, all HCPs must be reviewed to determine whether they are likely to jeopardize the continued existence of the species or cause adverse modification to designated critical habitat. The Services will provide technical assistance and work closely with the applicant throughout the development of the HCP to reduce the probability of developing an HCP that would not meet these criteria.

It is possible to approve an HCP that authorizes land use or development activities within an area designated as critical habitat. The activities approved under an HCP could include a variety of land or natural resource use activities that modify critical habitat on a large scale without the activities being deemed an adverse modification contrary to the requirements of section 7(a)(2). The authorization of activities in critical habitat through the HCP process is possible because the adverse modification of critical habitat is analyzed by deter-

mining the effects on the entire area designated as critical habitat or an administrative part or unit of the critical habitat, not on a smaller scale of particular individual acres. In addition, the HCP permittee must minimize and mitigate for any effects caused by. the authorized activity, which would offset or reduce the significance of adverse effects to the critical habitat.. Thus, the overall net affect of authorized land use activities for a particular HCP can be brought within the range of effects which is allowable under section 7.

3. Mitigation Programs & Standards.

Mitigation programs under HCPs and section 10 permits are as varied as the projects they address. Consequently, this handbook does not establish specific "rules" for developing mitigation programs that would limit the creative potential inherent in any good HCP effort. On the other hand, the standards used in developing HCPs must be adequate and consistent regardless of which Service office happens to work with a permit applicant. Mitigation programs should be based on sound biological rationale; they should also be practicable and commensurate with the impacts they address. This section sets forth some fundamental standards for mitigation programs and suggests some broad mitigation strategies, but leaves the development of specific programs to individual applicants and Service personnel.

Mitigation actions under HCPs usually take one of the following forms: (1) avoiding the impact (to the extent practicable); (2) minimizing the impact; (3)rectifying the impact; (4) reducing or eliminating the impact over time; or (5)compensating for the impact. For example, project effects can be (1)avoided by relocating project facilities within the project area; (2)minimized through timing restrictions and buffer zones; (3) rectified by restoration and revegetation of disturbed project areas; (4) reduced or eliminated over time by proper management monitoring, and adaptive management; and (5) compensated by habitat restoration or

protection at an onsite or offsite location, In practice, HCPs often use several of these strategies simultaneously or consecutively. Other types of mitigation not mentioned may also be used.

a. Regulatory Standards & Relationship to Recovery.

Issuance criteria under section. 10 of the ESA require that the HCP applicant "minimize and mitigate" the impacts of any incidental taking authorized by a section 10 permit, and that issuance of the permit not "appreciably reduce the likelihood of the survival and recovery of the species in the wild" (see Chapter 7). Section 7(a)(2} of the ESA requires that issuance of a permit does not "jeopardize the continued existence of any federally listed species, or result in "destruction or adverse modification" of designated critical habitat. The implementing regulations of section 7 define "jeopardize" as "to engage in an action that reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood of *both* the survival and recovery of the species in the wild by reducing the reproduction, numbers, or distribution of that species"—this is essentially identical to the section 10 issuance criterion cited above. Section 7(a)(2) also requires use of "the best scientific and commercial data available" in fulfilling its provisions. No other specific mitigation standards for HCPs are specified under the ESA.

Issuance of a section 10 permit must not "appreciably reduce" the likelihood of the survival and recovery of the species in the wild. Note that this does not explicitly require an HCP to recover listed species, or contribute to their recovery objectives outlined in a recovery plan. This reflects the fact that HCPs were designed by Congress to authorize incidental take, not to be mandatory recovery tools.

However, recovery is nevertheless an important consideration in any HCP effort. This is because, some HCPs may encompass all or much of a species' range and address crucial

biological issues; because of the inherent biological significance of such planning areas, a poorly designed HCP could readily trigger the "appreciably reduce" or "jeopardize" standard. Second, many HCPs, even smaller ones, can be said to contribute to recovery to the extent that individually or collectively they provide for dependable conservation actions and long-term biological protections. Thus, contribution to recovery is often an integral product of an HCP, but it is not an explicit statutory requirement.

To put this in practical terms, applicants should be encouraged to develop HCPs that produce a net positive effect for the species or contribute to recovery plan objectives. The Services should also assess the extent to which an HCP's mitigation program is consistent with recovery plans. In general, conservation plans that are not consistent with recovery plan objectives should be discouraged.

Similarly, HCPs that might preclude a significant recovery option, unless they otherwise contribute substantially to the goal of recovery should also be discouraged. Incases where a recovery plan is not available, the Services must use other available biological information and its best judgement to encourage. the development of HCPs that would aid in a species' recovery.

b. Must An HCP Benefit the Species?

Whether *or not an* HCP must benefit a species is similar to its relationship to recovery objectives. No explicit provision of the ESA or its implementing regulations requires that an HCP must result in a net benefit to affected species. However, just as they c'an contribute to recovery, HCPs can also benef t the species they address because of the conservation programs they establish and the .long-term assurances they provide. This is especially true of regional and other large-scale HCPs that address all or much of a species' range. Wherever

feasible, the FWS and NMFS should encourage HCPs that result in a "net benefit" to the species.

c. Mitigation for Habitat Loss.

Activities conducted under HCPs frequently involve permanent habitat losses (or temporary habitat disturbances), for which the permittee mitigates by acquiring or otherwise protecting replacement habitat at an onsite or offsite location. Commonly referred to as "habitat mitigation," this strategy is acceptable under the HCP process so long as such mitigated habitat losses are consistent with the section to issuance criteria.

One form of habitat mitigation is the "habitat bank" approach, in which habitats are "banked" (protected through Conservation easement or other means) prior to a project. These lands are then utilized as needed for mitigation purposes. A variation on this scheme is the "mitigation credit" system—in which "banked" habitats are established as "credits" (usually on a per-acre basis), and the habitat banker then uses the credits, as needed or sells them to other parties requiring mitigation lands at a fair market price. The latter system has considerable promise as a mitigation strategy because: (1) it allows owners of endangered species habitat to derive economic value from their land as habitat; (2) it allows parties with mitigation obligations to meet their obligations rapidly (mitigation lands are simply purchased as credits}; and (3) the mitigation lands are provided prior to the impact (eliminating uncertainty about whether a permittee might fail to fulfill the HCP's obligations after the impact has occurred). Still another approach is the "mitigation fund," in which a permittee pays a cash amount as determined by the HCP into an account administered by a suitable entity, and where other such contributions are pooled into a habitat acquisition fund.

The type of mitigation habitat and its proximity to the area of impact will need to be considered. Generally, the location of

replacement habitats should be as close as possible to the area of act; it must also include similar habitat types and support the same species affected by the HCP. However, there may be good reason to accept mitigation lands that are distant from the impact area—e.g., if a Large habitat block as opposed to fragmented blocks can be protected or if the mitigation lands are obtained through a mitigation fund. Ultimately, the location of mitigation habitat must be based on individual circumstances and good judgement.

Potential types of habitat mitigation include, but are not limited to: (1) acquisition of existing habitat; (2) protection of existing habitat through conservation easements or other legal instruments; (3) enhancement or restoration of disturbed or former habitats; (4)prescriptive management of habitats to achieve specific biological characteristics; and (5) creation of new habitats. Here again, the specific strategy or combination of strategies used will depend on the species and type of habitat involved. In some cases, acquisition of high-quality existing habitat will be the best approach—for example, where the habitat type takes years to develop (e.g., old-growth forest). However, if such habitat is continually being lost, a strategy based on this method alone could result in net loss of habitat value. In other cases, restoring degraded habitat or creating new ones is the best strategy—for example, where the habitat type is relatively easy to manipulate (e.g., grasslands) where affected species depend on natural disturbance regimes that can be replicated through management regimes (e.g., prescribed fire or flooding), prescriptive management maybe preferable to habitat acquisition or protection alone.

Certain caveats may apply to these strategies, however. For example, when a mitigation program involves creation of habitat or restoration of degraded habitats, HCP participants should ensure that techniques used are proven and reliable or, if relatively new, that contingency measures or adaptive management procedures are included to correct for failures.

Sometimes, the HCP applicant may need to conduct activities prior to the time when replacement habitats can be provided. This is acceptable so long ~~as the~~ HCP provides legal or financial assurances that the permittee will fulfill the HCP's obligations. One way to accomplish this is through Letters of Credit controlled by the government *until the* mitigation lands have been provided. Another method is requiring a specified cash payment into a mitigation fund prior to commencement of HCP activities. However, such payments alone are not regarded as acceptable mitigation. Unless the fund is ultimately used and habitat is otherwise acquired. Mitigation funds have often been used in regional HCPs in which the responsible party for habitat mitigation under the HCP is a state or local government agency. Other samples are mitigation funds or other well-established mitigation programs utilized by small-landowners [see below, Section B.3(d)] In such cases, the responsibilities of individual contributors may end with the payment; and .any additional performance requirement would either be waived or would belong to the permitted agency.

One common issue raised during HCP negotiations is how long mitigation lands must be conserved. then habitat losses permitted under an HCP are permanent, protection of mitigation lands normally should also be permanent (i.e., "in perpetuity"). Mitigation for temporary habitat disturbances can be treated more flexibly; however, management logistics and other considerations may still dictate permanent mitigation for temporary impacts, though typically at a lesser rate than far permanent ones.

d. Funding Measures as Mitigation.

Another issue in cases where habitat is lost during HCP activities is whether funds contributed for purposes other than habitat acquisition or protection—e.g., species research—can serve as habitat mitigation. First and foremost, mitigation

should address compensate for habitat lost through the permitted activities of the HCP by establishing suitable habitat for the species chat will be held in perpetuity, if possible. For example, the mitigation requirement for low-effect HCPs that have a negligible effect on habitat could be to enhance existing habitat so that it meets the species' requirements. Generally, research is not considered a preferred mitigation strategy, since the type of mitigation is usually related directly to the type of effect.

It is acceptable in some cases for funding to be provided to State or Federal agencies to implement recovery actions within critical habitat, to restore degraded habitat, to address anthropogenic influences, and for conservation actions on larger, more secure populations of the affected species on public lands. In some cases, matching Federal/private funding has been developed under HCPs for such purposes.

e. Mitigation for Small-Scale, Low-Effect Projects.

It is important that methods be established by state and Federal wildlife agencies and other organizations that allow proponents of small projects or small-scale land use proposals to participate in larger HCPs, or that make convenient mitigation strategies accessible to low effect HCPs. For example, it is often difficult for an individual to locate and acquire a few acres of mitigation habitat, since lands are usually sold by the lot or in large segments. A good way to accommodate this problem is to establish mitigation fund accounts that accumulate funds until relatively large-scale acquisitions can be effected [see above, Section B 3(c)]. Habitat banks are another good way to handle this situation. Avoid requiring permittees to meet habitat mitigation requirements without a practical, accessible means of meeting that requirement. In general, flexibility is needed in addressing the unique circumstances often associated with small landowners and small-scale, low-effect HCPs.

f. Consistency in Mitigation Standards.

Mitigation measures required by individual FWS or NMFS offices should be as consistent as possible for the same species. This can be challenging when a species encompasses multiple offices or regions, but is essential. The first step is good communication between offices. The next is establishment of specific standards—e.g., for survey methods, buffer zones, or mitigation methods—and consistent implementation of those standards. Field Offices should coordinate these standards between biologists in the same office; Regional Offices should ensure consistency among Field Offices. Mitigation standards should also be developed in coordination with state wildlife agencies. The Service should not apply inconsistent mitigation policies for the same species, unless differences are based on biological or other good reasons and are clearly explained. Consistent mitigation strategies help streamline the HCP development process—especially for smaller HCPs—by providing readily available standards which applicants can adopt in their HCPs.

g. Adaptive Management.

The Services often incorporate adaptive management concepts into the HCP process to minimize the uncertainty associated with listed or unlisted species where there are gaps in the scientific information or their biological requirements. Over the years, there has been an increase in the diversity and geographical size of HCPs. As of late 1995, most HCPs approved were for planning areas of less than 1,000 acres. However, of the 200 HCPs being developed as of early 1996, approximately 25 exceed 10,000 acres, 25 exceed 100,000 acres, and 18 exceed 500,000 acres. This suggests that HCPs are evolving from a process developed primarily to address single developments to broad-based, landscape level planning tools utilized to achieve long-term conservation goals for listed and unlisted species, while allowing applicants to proceed with their land use and development.

For same species, not all of the scientific information needed to develop comprehensive long-term conservation strategies to conserve species may be available at the time of HCP development where these data gaps occur, not all of the questions regarding the long-term effects of implementing these HCPs can be answered. When significant uncertainty exists, it can be addressed through the incorporation and implementation of adaptive management measures into HCPs. For those HCPs with significant uncertainty, incorporating adaptive management provisions into the HCP becomes important to the planning process and the long-term interest of affected species. For example, an applicant's commitment to conduct watershed analyses (scientifically examining the conditions within watersheds and making site-specific recommendations) and then adjusting management strategies based on the results of the analyses for part or all of their lands is one form of adaptive management that has been applied to HCPs in the Pacific Northwest.

Through adaptive management, the biological objectives (or goals) of a conservation strategy are defined using techniques, such as models of the ecological system that includes its components, interactions, and natural fluctuations. If existing data makes it difficult to predict exactly what mitigation is needed to achieve a biological objective, then an adaptive management approach can be used in the HCP. The primary reason for using adaptive and management in HCPs is to allow for changes in the mitigation strategies that maybe necessary to reach the long-term goals for biological objectives) of the HCP, and to ensure the likelihood of survival and recovery of the species in the wild. Under adaptive management, the mitigation activities of the HCP could be monitored and analyzed to determine if they are producing the required results e.g., properly functioning riparian habitats). If the desired results were not being achieved, then adjustments in the mitigation strategy could be considered through an adaptive management clause of the HCP.

Research can fill data gaps and/or test the effectiveness of management and mitigation strategies, which can then be modified as new information is obtained. Adaptive management, if used, can provide a reliable means for assessing the mitigation and minimizing strategies outlined in HCPs, producing better ecological knowledge, and developing appropriate modifications that would improve the mitigation strategy for a species.

The base mitigation strategy or initial minimization and mitigation measures which are implemented must be sufficiently vigorous so that the Service may reasonably believe that they will be successful. An adaptive management approach is particularly useful when significant questions remain regarding an HCP's initial mitigation strategy. The Services should not approve an HCP using conservation strategies that have a low likelihood of success.

Monitoring is an important tool in an adaptive management approach and should be designed in a way that ensures data will be properly collected, analyzed, and used to adjust mitigation strategies, as appropriate. A key element of adaptive management is the establishment of testable hypotheses linked to the conservation strategies and their biological objectives. If monitoring determines that biological conditions are outside specific parameters or thresholds, which are defined in the HCP, the conservation strategies should be reviewed. The "thresholds" for review should be linked to key elements of the HCP and should be obtainable through monitoring data collected during the implementation of the HCP. These "threshold" levels should be clearly defined in the HCP and should be based upon measurable criteria, and monitoring should be clearl linked to those measurable criteria. The establishment of measurable criteria would dictate the type of monitoring including the number of samples, distribution of samples, and use of controls.

Prior to the issuance of a permit, there should be a clear understanding and agreement between the Services and the permittee as to the mitigation range of adjustments which might be required as a result of any adaptive management provisions. A mechanism for determining the magnitude of strategy change to be employed, based upon the results of the monitoring and the level of deviation significance from the desired condition, should be developed in advance so all parties are clear in this regard and can react at the appropriate time.

Corrective actions to any of the conservation strategies in the HCP should be based on significant "non-achievement" of the HCP's base mitigation. This does not preclude the Services from working with the applicant to develop a strategy to compensate for external factors (e.g., catastrophic fires or requesting the applicant to voluntarily increase the base mitigation strategy because of these external factors.

4. Monitoring Measures.

The section 10 regulations require that an HCP specify the measures the applicant will take to "monitor" the impacts of the taking resulting from project actions [50 CFR 17.22(b)(1)(iii)(B)and 50 CFR 222.22(b)(5)(iii)]. Monitoring measures described in the HCP should be as specific as possible and be commensurate with the project's scope and the severity of its effects.

For regional and other large-scale HCPs, monitoring programs should include periodic accountings of take, surveys to determine species status in project areas or mitigation habitats, and progress reports on fulfillment of mitigation requirements e.g., habitat acres acquired). Monitoring plans for HCPs should establish target milestones, to the extent practicable, or requirements throughout the life of the HCP, and where appropriate, adaptive management options (see Chapter 3, Section B 3(g)).

The following steps are logical elements for consideration in developing HCP monitoring programs for regional or other large-scale HCPs:

- Develop objectives for the monitoring program. Any monitoring program associated with HCPs should answer specific questions or lead to specific conclusions. If the objectives are well-developed, they will help shape a complete monitoring program.
- Describe the subject of the monitoring program—e.g., effects on populations of affected species, effects on the habitat of the species, or effects on both.
- Describe variables to be measured and how the data will be collected. Make sure these are consistent with the objectives of the monitoring program.
- Detail the frequency, timing, and duration of sampling for the variables. Determining how frequently and how long to collect data is important to the success or failure of the monitoring program. If the interval between samples is too long or too short, the monitoring program may not detect an effect. The frequency, timing, and duration of the sampling regimen should also relate to the type of action being evaluated, the species affected by the action, and the response of the species to the effects produced by the action.
- Describe how data are to be analyzed and who will conduct the analyses. A monitoring program is more effective when analytical methods are integrated into the design. For example, parametric and non-parametric statistical analyses require different sample sizes, which affect the frequency, timing, and duration of sampling.

- Monitoring must be sufficient to detect trends in species populations in the plan area but should be as economical as possible. Avoid costly monitoring schemes that divert funds away from other important HCP programs, such as mitigation.
- Monitoring programs can be carried out by a mutually-identified party other than the permittee, so long as this is specified in the HCP, funding is provided, and the party is qualified.

The FWS and NMFS also have a responsibility to monitor the implementation and success of HCPs. The Services may agree to specific monitoring responsibilities under the HCP, Implementing Agreement, or as part of the incidental take statement issued in conjunction with the section 7 biological opinion. Even if not specified in this manner, the agency still has the responsibility to monitor compliance with the terms of particular HCPs, including any adaptive management commitments incorporated into the HCP, and the section 10 program generally. One way to achieve this is to ensure that requirements for monitoring and status reports are included in HCPs where needed and by ensuring that such reports are submitted by permittees and reviewed by FWS or NMFS staff.

For regional HCPs, another way is to establish technical review teams to periodically evaluate HCP compliance and the success of adaptive management programs. Such teams could include species experts and representatives of the permittee, FWS, NMFS, and other affected public agencies. To maintain the credibility of the HCP, it may be beneficial to submit the technical team's findings to occasional review by recognized experts in pertinent fields (e.g., conservation biologists, re-vegetation specialists; etc.).

Not all of the above steps are necessary for small-scale, low-effect HCPs, and should only be used as appropriate.

5. Unforeseen Circumstances/Extraordinary Circumstances.

Congress recognized in the section 10 amendments that ". . . circumstances and information may change over time and that the original plan might need to be revised. To address this situation the Committee expects that any plan approved for a long-term permit will contain a procedure by which the parties will deal with unforeseen circumstances." (H.R. Rep. No. 97-835, 97th Congress, Second Session). Accordingly, Federal regulation requires such procedures to be detailed in the HCP [50 CFR 17.22(b)(1)(iii)(C)]. At the same time the legislative history states that:

> The Committee intends that the Secretary may utilize this provision to approve conservation plans which provide long-term commitments regarding the conservation of listed as well as unlisted species and long-term assurances to the proponent of the conservation plan that the terms of the plan will be adhered to and that further mitigation requirements will only be imposed in accordance with the terms of the plan. In the event that an unlisted species addressed in the approved conservation plan is subsequently listed pursuant to the Act, no further mitigation requirements should be imposed if the conservation plan addressed the conservation of the species and its habitat as if the species were listed pursuant to the Act." (H.R. Report No. 97-835, 97th Congress, Second Session, and 50 FR 39681-39691.)

This Congressional history illustrates the potential tension between two primary goals of the HCP program: (1) adequately minimizing and mitigating for the incidental take of listed species, and (2) providing regulatory assurances to section 10 permittees that the terms of an approved HCP will not change over time, or that necessary changes will be minimized to the extent possible, and will be agreed to by the

applicant. How to reconcile these objectives remains one of the central challenges of the HCP program.

"Unforeseen circumstances," also referred to as "extraordinary circumstances," in the past have been broadly defined to include a variety of changing circumstances that may occur over the life of an ongoing HCP. However, it is important to distinguish between the terms "unforeseen circumstances," or "extraordinary circumstances," versus "changed circumstances." "Changed circumstances" are not uncommon during the course of an HCP and can reasonably be anticipated and planned for (e.g., the listing of new species, modifications in the project or activity as described in the original HCP, or modifications in the HCP's monitoring program). "Unforeseen circumstances" or "extraordinary circumstances" however, means changes in circumstances surrounding an HCP that were not or could not be anticipated by HCP participants and the Services, that result in a substantial and adverse change in the status of a covered species.

With respect to anticipated and possible changed circumstances, the HCP should discuss measures developed by the applicant and the Services to meet such changes over time, possibly by incorporating adaptive management measures for covered species, in the HCP. HCP .planners should identify potential problems in advance and identify specific strategies or protocols in the HCP for dealing with them, so that adjustments can be made as necessary without having to amend the HCP.

The "Unforeseen/Extraordinary Circumstances" section of the HCP should be more limited. It should discuss how those changes in the circumstances surrounding the HCP that cannot effectively be anticipated by HCP negotiators will be dealt with in the future. It must also be consistent with the Department of Interior's and Department of Commerce's "No Surprises" policy.

a. The "No Surprises" Policy.

To address the problem of maintaining regulatory assurances and providing regulatory certainty in exchange for conservation commitments, the Department of the Interior (DOI) and Department of Commerce (DOC) have jointly established a "No Surprises" policy for HCPs.

The "No Surprises'' policy sets forth a clear commitment by the FWS, NMFS, DOI, and DDC that, to the extent consistent with the requirements of the Endangered Species Act and other Federal laws, the government will honor its agreements under an approved HCP for which the permittee is in good faith implementing the HCP's terms and conditions. The specific nature of these provisions will vary among HCPs depending upon individual habitat and species needs.

The "No Surprises" policy provides certainty for private landowners in ESA Habitat Conservation Planning through the following assurances:

- In negotiating "unforeseen circumstances" provisions for HCPs, the Fish and wildlife Service and National Marine Fisheries Service shall not require the commitment of additional land or financial compensation beyond the level of mitigation which was otherwise adequately provided for a species under the terms of a properly functioning HCP. Moreover, FWS and NMFS shall not seek any other form of additional mitigation from an HCP permittee except under extraordinary circumstances.

This means that if unforeseen circumstances occur during the life of an HCP, the FWS and NMFS will not require additional lands, additional funds, or additional restrictions on lands or other natural resources released for development or use, from any permittee, who in good faith, is adequately implementing or has implemented an approved HCP. Once a permit has been issued and its terms are being complied with,

the permittee may remain secure regarding the agreed upon cost of mitigation, because no additional mitigation land, funding, or land use restrictions will be requested by the Services. The policy also protects the permittee from any other forms of additional mitigation, except where extra-ordinary circumstance exist..

Other methods of responding to the needs of the affected species, such as government action and voluntary conservation measures by the permittee, remain available to assure the requirements of the ESA are satisfied.

Consequently, the "No Surprises" policy .also provides that:

- If additional mitigation measures are subsequently deemed necessary to provide for the conservation of a species that was otherwise adequately covered under the terms of a properly functioning HCP, the obligation for such measures shall not rest with the HCP permittee.

This means that in cases where the status of a species addressed under an HCP worsens, the primary obligation for implementing additional conservation measures would be borne by the Federal government, other governmental agencies, private conservation organizations, or other private landowners who have not yet developed an HCP.

"Adequately covered" for listed species refers to any species addressed in an HCP which has satisfied the permit issuance criteria under section 10(a)(2)(B) of the ESA. For unlisted species, the term refers to any species which is addressed in an HCP as if it were listed, pursuant to section 4 of the ESA, and in which HCP conditions for that species would satisfy permit issuance criteria under section 10(a)(2)(B) of the ESA if the species were listed. "No Surprises" assurances apply only to species that are adequately covered in the HCP. Species should not be included in the HCP permit if data gaps or insufficient information makes it impossible to craft

conservatian/mitigation measures for them. Such data gaps can be overcame, however, through the inclusion of adaptive management clauses in the HCP (See Chapter 3, Section 3.B(g)).

- If extraordinary circumstances warrant the requirement of additional mitigation from an HCP permittee who is in compliance with the HCP's obligations, such mitigation shall maintain the original terms of the HCP to the maximum extent possible. Further, any such changes shall be limited to modifications within Conserved Habitat areas or to the HCP's operating conservation program for the affected species. Additional mitigation requirements shall not involve the payment of additional compensation or apply to parcels of land available for development or land management under the original terms of the HCP without the consent of the HCP permittee.

This means that if extraordinary circumstances are found to exist, the Services will consider additional mitigation measures; however; such measures must be as close as possible to the terms of the original HCP and must be limited to modifications within Conserved Habitat areas or the HCP's operating conservation program or to lands that are already protected by the HCP. New mitigation measures should not include requirements for additional land protection, payment of funds, or apply to lands available for development or use under the HCP, unless the permittee consents to such additional measures. "Modifications within Conserved Habitat areas or to the HCP's operating conservation program" means limiting such changes to plan areas explicitly designated for habitat protection or other conservation uses, or redirecting or increasing the intensity, range, or effectiveness of conservation efforts in such areas, provided that any such changes do not impose new restrictions or financial compensation on the permittee's activities. For

example, if a developer had agreed to dedicate a certain amount of funding annually in support of .a particular conservation program (e.g., habitat restoration} but subsequent research demonstrated that greater conservation benefits could be achieved by redirecting funding into depredation control, and extraordinary circumstances warranted such a shift, the No Surprises policy would allow the modification since it would impose no new funding burden on the permittee.

The policy also sets out criteria for determining whether and when extraordinary circumstances arise where the government could request review of certain aspects of the HCP's conservation program.

- The FWS and NMFS shall have the burden of demonstrating that such extraordinary circumstances exist, using the best scientific and commercial data available. Their findings must be clearly documented and based upon reliable technical information regarding the status and habitat requirements of the affected species.

- In deciding whether any extraordinary circumstances exist which might warrant. requiring additional mitigation from an HCP permittee, FWS and NMFS shall consider, but not be limited to, the following factors: (a) size of the current range of affected species; (b) percentage of range adversely affected by the HCP; (c) percentage of range conserved by the HCP; (d) ecological significance of that portion of the range affected by the HCP; (e) level of knowledge about the affected species and the degree of specificity of the species' conservation program under the HCP; (f) whether the HCP was originally designed to provide an overall net benefit to the affected species and contained measurable criteria for assessing the biological success of the HCP; and (g) whether failure

to adopt additional conservation measures would appreciably reduce the likelihood of survival and recovery of the affected species in the wild.

The first of these two measures, on the burden of proof, is self-explanatory. The second identifies some factors to be considered by the Services in determining whether extraordinary circumstances exist. Generally, the primary focus of inquiry would be level of biological peril to species covered by the HCP in question, and the degree to which the welfare of those species is tied to a particular HCP. For example, if the species is declining rapidly, and the HCP in question encompasses an ecologically insignificant portion of the species' range, then extraordinary circumstances typically would not exist. Conversely, if the HCP in such circumstances encompasses a majority of the species' range, then extraordinary circumstances justifiably could be said to exist.

- The FWS and NMFS shall not seek additional mitigation for a species from an HCP permittee where. the terms of a properly functioning HCP agreement were designed to provide an overall net benefit for that species and contained measurable criteria for the biological success of the HCP which have been or are .being met.

This provision means that the Services will not attempt to impose additional mitigation measures of any type where and HCP was intentionally designed to have a net positive impact upon a species. It is intended to encourage HCP applicants to develop HCPs that provide an overall net benefit to affected species. It does not mean that any HCP must in fact have already achieved a net benefit before the "No Surprises" policy applies. Rather, the achievement of such benefits should be measured through a clearly articulated set of biological goals and an adequate monitoring program for measuring progress for achieving those goals.

"Properly functioning HCP" means any HCP whose provisions have been or are being fully implemented by the permittee and in which the permittee is in full compliance with the terms and conditions of the permit.

- Nothing in this policy shall be construed to limit or constrain the Services or any other governmental agency from taking additional actions at its own expense to protect or conserve a species included in an HCP.

This means the Services can intercede on behalf of a species at their own expense at any time and be consistent with the assurances provided the permittee under this policy and the permit. Neither is there anything in the "No Surprises" policy that prevents the Services from requesting a permittee to voluntarily undertake additional mitigation on behalf of affected species, though of course the permittee is under no obligation to comply.

FWS and NMFS have a wide array of authorities and resources that can be utilized to provide additional protection for threatened or endangered species included in an HCP. Therefore, in meeting their commitment under the "No Surprises" policy consistent with their obligations under the ESA), it is extremely unlikely that the Services would have to resort to protective or conservation action requiring new appropriations of funds by Congress. In such an unlikely event, such actions would necessarily be subject to the requirements of the Anti-Deficiency Act and the availability of funds appropriated b the Congress.

Sample language for including "No Surprises" assurances in the HCP or Implementing Agreements is provided in Sections 8.4 and 13.3(a) of the "template" Implementing Agreement in Appendix 4.

b. HCP Amendments.

Amendment of a section 10(a)(1)(B) permit is required when the permittee wishes to significantly modify the project, activity, or conservation program as described in the original HCP. Such modifications might include significant boundary revisions, alterations in funding or schedule, addition of species to the permit that was not addressed in the original HCP, or adjustments to the HCP necessitated by unforeseen circumstances. A permit amendment consists of of the same process as the original permit application, requiring an amendment to the HCP addressing the new circumstance(s), a Federal Register notice, NEPA compliance, and an intra-Service section 7 consultation.

Some amendments to an HCP commonly needed over the life of a permit are minor and can be incorporated in a more expedited fashion. These types of amendments include corrections in land ownership; minor revisions to survey, monitoring, or reporting protocols; and minor changes in reserve boundaries that result in no net loss of reserve land or do not otherwise alter the effectiveness of the HCP. They can be incorporated into the HCP in one of two ways.

First, the HCP and permit can be formally amended just as with more significant changes. However, documentation requirements are often less for a permit amendment than for the original permit application. For example, the NEPA analysis for the amendment can be tiered off the NEPA analysis for the original permit (40 CFR 1502.20), or the original NEPA analysis can be incorporated by reference into the amendment's supporting documents (50 CFR 1502.21). Also, where an original permit application required an EIS, the amendment application might require an EA only. Where appropriate, a permit amendment can also.be treated as a low-effect HCP, which is categorically excluded from NEPA [see Chapter 1, Section F.2].

The HCP can also be amended administratively without formal amendment of the permit itself. This type of expedited amendment procedure is encouraged, but only when: (1) the amendment has the unanimous consent of the permittee and FWS or NMFS; (2) the original HCP established specific procedures for incorporating minor amendments so that the public had an opportunity to comment on the process, and such amendments are consistent with those procedures; (3) the HCP defines what types of amendments are considered minor; (4) a written record of any such amendments is prepared; and (5) the net effect on the species involved and level of take resulting from the amendment is not significantly different than analyzed under the original HCP and the Service's decision documents.

It is important to distinguish between amendments to the HCP and amendments to the permit itself. Changed circumstances might require an amendment to both, but an amendment to either the HCP or the permit without an associated amendment to the other is possible. Minor changes in the HCP can be completed administratively without amending the permit. Similarly, amendment to the permit without a change in the HCP can also occur—for example, when an unlisted species that was addressed in the HCP is subsequently listed and is added to the permit, though permit amendments in such cases are not always necessary. Chapter 4 describes the procedures for addressing unlisted species in section 10 permits. Chapter 6, Section G contains further discussion about permit amendments generally.

6. Funding.

The ESA requires that the HCP detail the funding that will be made available to implement the proposed mitigation program. Measures requiring funding in an HCP typically include onsite measures during project implementation or construction (e.g., pre-construction surveys, biological monitors, exclusion fences, etc.), as well as onsite and offsite

measures required after completion of the project or activity (e.g., revegetation of disturbed areas and acquisition of mitigation lands). Large-scale, regional HCPs should require funds for long-term needs such as biological. monitoring and habitat acquisition programs. Some will even require perpetual funding mechanisms to support long-term management of mitigation lands or for monitoring. For low-effect HCPs with minor impacts, funding needs may be limited to activities such as pre-construction, post-construction, habitat restoration, or surveys and payment into a mitigation fund; longer-term funding measures typically are not needed.

For relatively small- to medium-sized projects involving only one or two applicants, the funding source is usually the permittee and funding is provided immediately before project activities commence, immediately after, or in stages. However, when habitat modification or other take occurs before mitigation measures (e.g., acquisition of mitigation lands) are implemented, completion of the mitigation requirements should be ensured through a Letter of Credit or other means [see above, Section B.3].

Funding of regional HCPs can be more complicated because they generally cover large areas, many activities, and require significant budgets. Consequently, regional HCPs usually are funded jointly rather than by any single contributor. Funding strategies for regional HCPs can include: (1) development fees paid on a per-acre (or other) basis; (2) other types of mitigation fees (e.g., water surcharges, fees targeted to specific activities or industries); (3) funds contributed by non-profit or private interests; (4) state or Federal funds; (5) assessment districts under state law or county ordinance; and (6) tax check-off programs.

Because of their size and scope, regional HCPs often face two funding challenges--the costs of developing and implementing the HCP. Funding problems for these HCPs can be. especially difficult during the HCP development phase, which

typically occurs before funding mechanisms for the completed HCP are in place. Where appropriate, FWS and NMFS personnel should assist local governments in seeking out HCP funding assistance. However, the demand for such funds is likely to grow and the availability of funds to be limited; consequently, guarantees cannot be provided to any particular HCP applicant that funding would be available. Consistent with the requirements of the Anti-Deficiency Act, any commitment of Federal funding is always subject to the availability of appropriated funds.

When perpetual funding is needed, the HCP must establish programs or mechanisms to generate such funds. One way of achieving this is through payment of development fees by the applicant or other affected parties into an interest-bearing bank account, from which the interest, not the principal, is used to fund the program. The HCP should detail fund collection and management mechanisms for this purpose, as well as remedies for failure to meet funding obligations by signatory members. The I.A must always contain a provision stating that any Federal funding is subject to the requirements of the Anti-Deficiency Act and the availability of appropriated funds.

Whatever the proposed funding mechanism is, failure to demonstrate the requisite level of funding prior to permit approval or to meet funding obligations after the permit is issued are grounds for denying a permit application or revoking or suspending an existing permit respectively.

In some cases, conservation funds may be transferred to a government agency to be utilized in furthering the purposes of the HCP, FWS or NMFS can accept contributed funds for mitigation purposes, monitoring, research, permit administration, and other activities. However, because of Federal procedural requirements in administering such funds and the potential for an appearance of a conflict of interests, the FWS Administrative Services Division and Department of the

Interior Solicitor's Office (or equivalent office for NMFS) should be consulted before agreeing to any such mechanism.

7. Alternatives Analyzed.

Some applicants find this a difficult element of the HCP because they are uncertain about which or how many alternatives to consider. In some cases, the HCP process may not be initiated until the applicant has planned the project, only to discover that endangered species are present on the project site and an incidental take permit is needed.

The Act requires a description of "alternative actions to such taking." Thus two alternatives commonly included in the "Alternatives Analyzed" section of the HCP are: (1) any specific alternative, whether considered before or after the HCP process was begun, that would reduce such take below levels anticipated for the project proposal; and (2) a "no action" alternative, which means that no permit would be issued and take would be avoided or that the project would not be constructed or implemented. For low-effect HCPs in which the project or impact on endangered-or threatened species is minor or negligible, a "no action" alternative alone may suffice.

For some HCPs, several alternatives may have been considered during project development. Each should be discussed in the "Alternatives Analyzed" section; or, where they are too numerous, the principal ones should be discussed. The applicant also must explain in this section why these alternatives were not adopted. If the applicant ultimately selects an alternative that the FWS or NMFS agrees will not result in take, no section 10 permit or NEPA compliance is needed. Chapter 3, Section B.7 explains how the alternatives analysis requirements under section 10 and NEPA compare.

Permit applicants commonly ask whether economic considerations can be cited as a reason for rejecting project

alternatives. Such considerations are permissible, especially when the effects on the applicant would be significantly adverse or economically infeasible. However, if economic considerations are the basis for rejecting alternatives, data supporting this decision must be provided to the extent that it is reasonably available and non-proprietary. While applicants may be hesitant to provide such information, it can be important in making the required finding that the HCP represent minimization and mitigation to the maximum extent practicable.

Neither the FWS nor NMFS have the authority to impose a choice among the alternatives analyzed in the HCP. The Services' role during the HCP development phase is to advise the applicant in developing an acceptable HCP, and, when necessary to try to dissuade the applicant from selecting alternatives not consistent with permit issuance criteria. Nevertheless, if the applicant proceeds with such an alternative, recognizing the increased chance of denial of the permit, the Services must process the application and provide an opportunity for Federal Register notice and public comment (see Chapter 6, Section D).

8. Additional Measures—Implementing Agreements.

Whether or not an Implementing Agreement should be prepared for a given HCP will depend on the size and scope of the HCP and the wishes of either the Services or the applicant. Implementing agreements are not required for low-effect HCPs, and should be done only when one is requested by the permit applicant. In other HCPs, the development of the IA is left to the discretion of the Regional Director. Implementing Agreements are recommended for regional or other large-scale HCPs that address significant portions of a species range or involve numerous activities or landowners, for HCPs with long-term mitigation and monitoring programs, or where habitat protection programs are complicated or have other special features.

Section 10(a)(2)(B) of the ESA—which describes issuance criteria for incidental take permits—authorizes the Services to obtain "such other assurances as [they] may require that the plan will be implemented." This provision allows the Services broad latitude to require measures as necessary to accommodate the wide variety of circumstances often encountered in HCPs.

Implementing Agreements can help assure the government that the applicant will implement the mitigation program and other conditions of the HCP, while assuring the applicant that agreed upon procedures will be followed for any changes in the conditions of the permit or the conservation measures for species addressed in the HCP. Although the Services and permit applicant possess these rights and responsibilities under the permit, both sides may prefer the additional specificity of an Implementing Agreement because the Agreement is tailored for the HCP in question, can be more detailed than the permit conditions, and is signed by all parties, thus providing the explicit consent of each party to abide by the terms of the HCP.

Implementing Agreements can also strengthen a Finding of No Significant Impact under NEPA by ensuring implementation of the mitigation program. This can be especially important for "mitigated EAs" [see Chapter 5, Section A.3(a)]. They can also extend responsibilities under an HCP beyond the life of the permit itself (e.g., by requiring perpetual protection of mitigation lands) and can set out a process for implementing the assurances under the "No Surprises" policy [see above, Section B.5(a)].

Typically, an Implementing Agreement includes one or more of the following elements: (1) defines the obligations, benefits, rights, authorities, liabilities, and privileges of all signatories and other parties to the HCP; (2) assigns responsibility for planning, approving, and implementing specific HCP measures; (3) specifies the responsibilities of the FWS,

NMFS, or other state and Federal agencies in implementing or monitoring the .HCP's conservation program; (4) provides for specific measures when habitat acquisition, transfer, or other protections are part of the HCP's mitigation program; (5) establishes a process for amendment of the HCP, where necessary; and (6) provides for enforcement of HCP measures and for remedies should any party fail to perform on its obligations under the HCP.

The handbook delegates to the Regional Directors (or where appropriate, the NMFS Director. Office of Protected Resources in Washington. D.C.) the discretion to decide if HCP Implementing Agreements are beneficial on a case-by-case basis. IAs are not done for low-effect HCPs unless requested by the applicant. Each Regional Director or the NMF Office of Protected Resources Director shall determine the circumstances under which, Implementing Agreements may be required for HCPs under his or her respective, jurisdiction.

Chapter 6, Section B.2(g)'provides further information about developing and processing Implementing Agreements. Appendix 4 contains a "template" Implementing Agreement that can be used to develop Agreements for individual projects. The template is intended to expedite development of Implementing Agreements for HCPs, because it identifies the basics needed for developing Agreements. The template has all necessary legal elements for Agreements for HCPs except project-specific information, which can be filled in as indicated.

C. Alternative HCPs

1. Addressing Species Through Habitat-Based HCPs.

Most of the HCPs that are being developed address the requirements of section 10(a)(2) on a species-by-species basis. A smaller number of HCPs, however, have focused on specific types of habitat rather, than on a particular listed species. The rationale for a habitat-based approach is that if

certain habitat-types are scientifically selected and assessed, and adequately protected under the terms of the HCP, the HOP could protect a broader range of species than the few "target" species that might otherwise be addressed by a conventional HCP. This approach may address all species within habitat-types within the plan area, .or habitat-types in conjunction with a specific list of species that will be covered by the permit.

HCPs developed in conjunction with the Natural Communities Conservation Program in Southern California are examples of habitat-based HCPs. The State of California, under the Natural Community Conservation Planning Act of 1991 (NCCP), has initiated a program to conserve populations of California native animal and plant species and their habitats in areas large enough to ensure their long-term viability. The initial NCCP effort is focusing on the coastal sage scrub community in southern California for the development of subregional HCPs.

In the habitat-based approach, a particular habitat type within a planning area is selected and then adequately addressed in the HCP, based on criteria agreed to by the Services and the applicant. The Service and the applicant generally use indicator species to set management parameters for the covered habitat in the HCP. A further test must be completed to ensure that the needs of all endemic and sensitive species (listed, proposed, candidate, or species of concern) associated with the covered habitat types are adequately addressed in the HCPs.

An entire list of known covered species (listed and unlisted) adequately addressed in the habitat-based HCP could also be included on a permit. This list may include proposed and candidate species; however, since such species are only subject to State—as opposed to Federal—jurisdiction, there should be a delayed effective date for the permit for such species. That delayed effective date should be the date the

affected species is subsequently listed. Including an unlisted species on the permit in this way requires that the Services analyze the effects of the proposed HCP on that species under sections 7 and 10 of the ESA, just as if that species were listed. Under this method, the assurances of the "No Surprises" policy would apply to all covered species associated with the habitat-type as described in the list of species that are adequately, covered in the HCP. If an unlisted species, which was adequately covered by the HCP and listed on the permit, is subsequently listed after permit issuance, the HCP permit would not have to be formally amended because all procedural permit requirements for these species were met when the permit was originally issued and the species was included on the permit with the .delayed effective date (the subsequent date of listing). However, if an unlisted species associated with a habitat-type adequately covered in the HCP is subsequently Listed, and it was not originally included on the permit, the Services would. have to formally amend the permit and satisfy all procedural permit amendment requirements before it could authorize incidental take.

Prior to amending the permit, the applicant would have to make sure the species was adequately addressed in the HCP, and the Services would have to conduct independent assessments of the proposed actions under section 7 of the Act, make findings under section 10 of the ESA, and also ensure that the HCP complies with NEPA. Including covered species (listed and unlisted) in the original permit will help eliminate additional work associated with amending the permit, minimize duplication of effort, and minimize the cost associated with developing an HCP.

Habitat-based HCPs are new to the section 10 program and the Service is exploring this approach carefully. Adaptive management clauses (see Chapter 3, Section B.3(g)) may be helpful in defining where data gaps or uncertainty exists and, thus, areas where the Service and the applicant agree future

modifications to the HCP may be needed. For further information about habitat-based HCPs, contact the Washington, D.C. Division of Endangered Species Section 10 Coordinator (FWS) or the Washington, D.C. Office of Protected Resources (NMFS).

2. Programmatic HCPs.

The programmatic HCP is a relatively new concept that has begun to emerge recently in HCPs developed with the FWS. The FWS has begun to develop programmatic HCPs for County and State governments, such as the "state-wide" HCP being developed with the State of Georgia for the red-cockaded woodpecker. The programmatic HCP allows numerous entities to be involved in the HCP through "Certificates of Inclusion" or "Participation Certificates," which convey the take authorization of the official section 10(a)(1)(B) permit to the certificate recipient. A programmatic HCP can be used to address a group of actions as a whole, rather than one at a time in separate HCPs. For example, a programmatic HCP might address a single related action occurring in many different places (e.g., the development of single family houses in the same vicinity or the harvesting of trees in the presence of red-cockaded woodpeckers), or address a group of different actions occurring in the same place. Programmatic HCPs can reduce staff and preparation time, but are appropriate only in certain types of situations.

The central problem in preparing a programmatic HCP is having sufficient information to determine and evaluate effects when the exact number and scope of actions taking place may be uncertain. As a result, programmatic HCPs will be successful only when the activities being addressed are well-defined, similar in nature, and occur within a described geographical area or at similar points in time.

Because this is a relatively new concept, the Service strongly encourages that programmatic HCPs be developed in conjunction with the Regional and Washington Office. In addition, this type of a section 10(a)(l)(B) permit should not be issued to representatives of Federal agencies since section 7 is the correct avenue for dealing with "may effect" situations and possible incidental take by Federal agencies.

NMFS provides for "Certificates of Inclusion" in its regulations (50 CFR 222.22(f)). Certificates are issued by NMFS to any individual who wishes to conduct an activity covered by a general incidental take permit. The general permit can be applied for by any group or organization whose members conduct the same or similar activity and have the same or similar impacts on endangered marine species. For example, a fisheries organization or a state regulatory agency may apply for a general incidental take permit so that "Certificates of Inclusion" would then be required by its members or regulated entities. These groups also may apply for a standard permit. Applicants should discuss the alternatives with NMFS to determine which is the most appropriate.

D. Addressing Migratory Birds and Eagles (FWS Only)

In the past, section 10 applicants faced an additional issue when listed migratory birds or bald eagles occurred in an HCP planning area. The Migratory Bird Treaty Act (MBTA) and Bald and Golden Eagle Protection Act (BGEPA) prohibit the take of migratory birds and bald eagles, respectively. Consequently, questions have arisen as to whether a section 10 permittee remained legally liable for the incidental take of listed species protected by the MBTA and BGEPA, if take of the same species was authorized by an ESA section 10 permit.

This situation has now been clarified. The FWS has concluded that under certain conditions, a section 10 permit for listed migratory birds is sufficient to relieve an HCP

permittee from liability under the MBTA and BGEPA for those species covered by the HCP permit. For the MBTA, this is accomplished by having the HCP permit double as a Special Purpose Permit authorized under 50 CFR § 21.27. For BGEPA, it is accomplished by utilizing the FWS's prosecutorial discretion to state that FWS would not prosecute an incidental take under the BGEPA if such take is in compliance with an ESA section 10 permit. However, the following conditions must be satisfied before either of these protections apply: (1) any species to be so treated with respect to the MBTA and BGEPA must also be listed under the ESA; and (2) the incidental take of any such species must be authorized, subject to applicable terms and conditions, under section 10(a)(1)(B) of the ESA (see Appendix 5). The Service believes that this approach is warranted because the permittee already would have agreed to a package of mitigation measures designed to minimize and mitigate the take of the listed species of migratory birds to the maximum extent practicable.

In qualifying cases, the following language concerning MBTA-and BGEPA-protected species shall be included in the terms and conditions of a section 10 permit when the above conditions have been satisfied:

> [*For listed species other than the bald eagle*] This permit also constitutes a Special Purpose Permit under 50 CFR § 21.27 for the take of [*provide species' common and scientific names; species must be ESA-listed and may not include the bald eagle*] in the amount and/or number and subject to the terms and conditions specified herein. Any such take will not be in violation of the Migratory Bird Treaty Act of 1918, as amended (16 U.S.C. §§ 703-712).
>
> [*For the bald eagle*] The Service will not refer the incidental take of any bald eagle, *Haliaeetus leucocephalus*, for prosecution under the Migratory Bird Treaty Act of 1918, as amended (16 U.S.C. §§ 703-712), or the Bald and Golden Eagle Protection Act of 1940, as

amended (16 U.S.C. §§ 668-668d), if such take is in compliance with the terms and conditions (including amount and/or number) specified herein.

E. Coordinating.HCPs With National Wildlife Refuges (FWS Only)

National Wildlife Refuges (NWRs) occur nationwide, and HCPs are now being developed in most areas of the country. When planning efforts under these two programs occur in the same geographic vicinity, it creates significant opportunities for joint NWRIHCP habitat protection programs in which the two programs can support and complement each other. However, it also raises important questions regarding the relationship between the two programs—e.g., what are the government's and permittee's—respective roles and responsibilities in such joint NWR/HCP efforts, and how should such programs be jointly managed?

The FWS has developed a policy to assist its offices and staff in integrating the NWR and HCP programs. In brief, the policy states that the primary objective of integrating any NWR with an HCP is to increase benefits to the species involved, and that a NWR is not to be established or integrated with an HCP merely to substitute for the mitigation responsibilities of the section 10 permittee. This policy and additional guidance about integrating HCPs with National Wildlife Refuges is provided in Appendix 6.

E. "Safe Harbor" Policy: Linking Safe Harbor Assurances to Habitat Conservation Plans

The "Safe Harbor" approach is a strategy that provides private landowners, who undertake voluntary conservation actions on their lands, assurances that their future land-use activities will not be restricted further as a result of these proactive conservation efforts. If a landowner voluntarily enters into an agreement to manage his or her lands in a manner that attracts endangered or threatened species or

otherwise increases their presence, the "Safe Harbor assurances" guarantee no additional regulatory requirements for those lands will be imposed on the landowners as a result of the proactive conservation measures. The purpose of the "Safe Harbor" approach is to reduce the disincentives (e.g., fear of regulatory restrictions) that often cause landowners to avoid or prevent land use practices that would otherwise benefit endangered species.

If it is determined that it is appropriate to link Safe Harbor assurances with HCPs, specific directions for incorporating will be described in a forthcoming final Safe Harbor policy (see Appendix 7). [Note: If the draft Safe Harbor policy has not been published in the Federal Register, by the time this guidance is published, Appendix 7 will be reserved for this policy.]

The Services are currently considering whether, and if so, under what circumstances, it may be appropriate to allow a landowner to link a Safe Harbor Agreement to an HCP. The Services intend to submit this issue for further public analysis and comment.

APPENDIX O

[LOGO]

Recovery Plan for the Northern Spotted Owl—DRAFT

April, 1992

Manuel Lujan Jr.
Secretary of the Interior

Donald R. Knowles
Secretary's Representative, Team Coordinator

John Turner
Director, Fish and Wildlife Service

Marvin Plenert
Regional Director, Pacific Region, and Team Leader

Jonathan Bart, *Chairman*;
Robert G. Anthony; Melvin Berg; John H. Beuter; Wayne Elmore; John Fay; R.J. Gutiérrez; H. Theodore Heintz, Jr.; Richard S. Holthausen; Kenneth Lathrop; Kent Mays; Richard Nafziger; Martha Pagel; Christine Sproul; Edward E. Starkey, John C. Tappeiner.

Team Support: Charles Bruce; Philip Carroll; Susan Earnst; Catherine Elliott; Lawrence Finfer; Gordon Gould; Ann Hanus; David Hays; David Johnson; Linda Kucera; Cay Ogden; Josefa O'Malley; Craig Partridge; Nancy Pollot; Fred Seavey, Raul Tuazon.

This recovery plan is not intended to provide precise details on all aspects of northern spotted owl management. The recovery plan outlines steps necessary to bring about recovery of the species. The recovery plan is not a "decision document" as defined by the National Environmental Policy Act (NEPA). It does not allocate resources on public lands. The implementation of the recovery plan is the responsibility of federal and state management agencies in areas where the species occurs. Implementation is done through incorpora-

tion of appropriate portions of the recovery plan in agency decision documents such as forest plans, park management plans, and state game management plans. Such documents are then subject to the NEPA process of public review and selection of alternatives.

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Executive Summary of the Northern Spotted Owl Recovery Plan

Introduction

A recovery plan is called for by the Endangered Species Act to guide the management actions needed to bring a threatened or endangered species to a condition in which it no longer needs special protection of the act. The northern spotted owl (also referred to in the recovery plan as the spotted owl and the owl) was placed on the list of threatened species in June 1990. Since February 1991, a Recovery Team appointed by Secretary of the Interior Manuel

Lujan Jr. has been formulating a recovery plan for the spotted owl. This report presents a draft recovery plan for the northern spotted owl for review and comment by the public and government agencies.

The northern spotted owl draft recovery plan provides a comprehensive basis for management actions to be undertaken by forest landowners and wildlife agencies to alleviate conditions threatening the species. Primary actions will be taken by federal land management agencies in the Pacific Northwest—the U.S. Forest Service, the U.S. Bureau of Land Management, and the National Park Service. The U.S. Fish and Wildlife Service will oversee implementation of the plan through its authorities under the Endangered Species Act.

State forest management and wildlife agencies in Oregon, Washington, and California also will take actions that contribute to recovery under the plan. These state agencies have an important role in managing state forests and in regulating forest practices on private land within their jurisdiction. Contributions from habitat on Indian lands also were considered in formulating the draft plan.

The draft recovery plan was developed following review of the scientific data from previous plans for the spotted owl,

particularly the conservation strategy designed by the Interagency Scientific Committee (ISC) (Thomas et al. 19.90), and by analyzing the most recent data available on owl populations and their habitat. This biological information was the basis for designing measures to achieve recovery.

Secretary of the Interior Lujan also asked that the Recovery Team consider other species and economic effects to the extent allowed by law. The Recover Team made a substantial effort to determine the status and location of other species that could benefit from actions similar to those needed for owl recovery. Measures that would contribute to recovery of the owl, while also helping other species, were favored in decisions leading to the draft recovery plan.

Previous studies show that protection of sufficient habitat for a viable spotted owl population has substantial economic and social costs because of the reduction in timber harvests. The Recovery Team recognized that, under the Endangered Species Act, it could not consider measures short of achieving recovery for the northern spotted owl, even though such measures might cause significantly less economic and social losses. Instead, the Recovery Team looked for ways to achieve recovery that would cause less reduction in timber harvest and fewer job losses in the timber industry.

Recovery Objective

The objective of the draft recovery plan is to remove the northern spotted owl from the list of threatened species.

The Draft Recovery Plan

The northern spotted owl draft recovery plan has seven key elements:

1. A recovery objective and a set of criteria for determining whether conditions exist that would allow the northern spotted owl to be removed from the list of threatened species.

2. A network of designated conservation areas on federal forestlands, with each area designed to protect owl habitat sufficient to support a number of breeding pairs of owls.

3. A set of guidelines that govern management activities on federal forestlands in designated conservation areas.

4. A set of guidelines that govern management activities on federal forestlands outside of designated conservation areas.

5. A set of suggestions for contributions from nonfederal forestlands to support spotted owl populations.

6. A monitoring and research program that will provide new information on spotted owls and their habitat, and develop and test management techniques for promoting and maintaining owl habitat while allowing appropriate forest management.

7. Implementation mechanisms that provide oversight and coordination, relying primarily on existing authorities and forest management planning procedures.

Each of these elements is described briefly, followed by a discussion of the scientific basis for the plan and of the economic and social considerations built into the plan.

Delisting Criteria

The primary threat to the northern spotted owl leading to its designation as a threatened species is the reduction and fragmentation of its habitat in forests in Washington, Oregon, and northern California. Northern spotted owls use old-growth forests and other forests with similar characteristics for nesting, breeding, and rearing young. As timber harvesting has proceeded in the Pacific Northwest, the amount of habitat suitable for spotted owls has declined and remaining habitat areas have become smaller and more isolated from each other, particularly during the last 50 years. As a result,

the population of spotted owls declined, in some areas rather sharply.

The objective of the draft recovery plan is to reduce the threats to the spotted owl so that it can be removed from the list of threatened species anywhere in its range. The decision to remove the spotted owl from the list of threatened species can be made on an incremental basis for individual areas, called provinces, or for groups of provinces. The range of the spotted owl has been divided into 11 provinces.

Four criteria must be met before delisting is considered: (1) A scientifically credible plan for monitoring owl populations and owl habitat must have been in effect for at least 8 years: (2) the population must have been stable or increasing, as indicated by both density and demographic estimates, for at least 8 years; (3) regulatory mechanisms or land management commitments must have been implemented that provide for adequate protection of breeding, foraging, and dispersal habitat, and (4) analyses must indicate that the population in unlikely to need protection under the Endangered Species Act during the foreseeable future. The draft recovery plan emphasizes that all of these criteria must be satisfied before desting is considered.

Designated Conservation Areas

As the primary means for achieving recovery, the draft plan recommends establishing 196 designated conservation areas (DCAs) to provide approximately 7.5 million acres of federal forestland as the primary habitat for the northern spotted owl population. These DCAs include approximately 48 percent of the total remaining spotted owl nesting roosting and foraging habitation federal lands (Figure ES.1.) The largest DCAs are designed to support a population of 20 or more pairs of owls in habitat conditions that allow successful breeding and rearing of young. They are located to allow owls to disperse from one DCA to another. Each DCA

contains areas of currently existing owl habitat combined with areas of younger forests. These younger stands will be protected so they can mature into owl habitat. The DCAs contain approximately 1,180 known owl pairs on federal lands. This represents about 48 percent of the total pairs currently known on all federal lands (Figure ES.2.). When the DCAs become fully developed owl habitat, they will support a population of approximately 2,320 pairs of owls.

DCAs are located to take advantage of other forestland containing owl habitat that will not be harvested or will be harvested in a manner that does not reduce habitat value. Such areas include parks, wilderness areas, and certain administratively reserved areas. DCAs also are located in a pattern to reduce the risk to the owl population from natural threats such as fire, disease, and insects.

Management Rules for Designated Conservation Areas

The draft recovery plan recommends that activities on federal lands within the DCAs be focused on improving habitat conditions for spotted owls.

The following specific management rules for federal lands in DCAs are recommended.

1. No timber harvest is allowed in habitat suitable for northern spotted owls.
2. Silvicultural practices, such as thinning, will be used to promote rapid development of owl habitat in those areas that currently do not provide habitat suitable for owls.
3. Salvage of trees in stands significantly affected by fire, wind, insects, or diseases may occur but will be limited to safeguard owl habitat.
4. Management activities designed to reduce the risk of large-scale fire or insect infestation are limited to those needed to assure the continued existence of owl habitat within the DCA.

5. The recovery plan recommends that federal lands inside DCAs, with the exception of wilderness areas and national parks, be designated as critical habitat.

6. It also recommends that a management plan be prepared for each DCA before management activities are implemented.

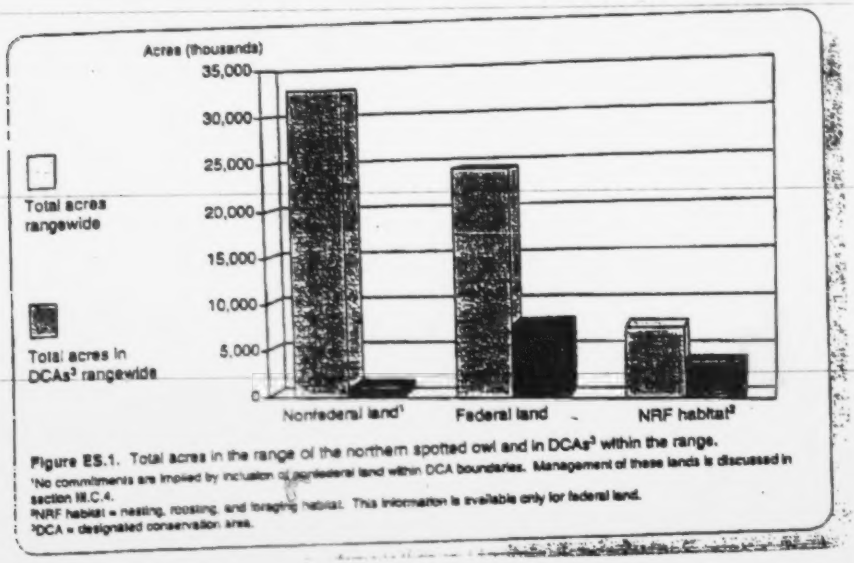


Figure ES.1. Total acres in the range of the northern spotted owl and in DCAs[2] within the range.
[1]No commitments are implied by inclusion of nonfederal land within DCA boundaries. Management of these lands is discussed in section III.C.4.
[3]NRF habitat = nesting, roosting, and foraging habitat. This information is available only for federal land.
[2]DCA = designated conservation area.

Management Guidelines for Federal Forestlands Outside Designated Conservation Areas

The draft recovery plan recommends guidelines for the maintenance of sufficient habitat conditions on federal lands outside DCAs to allow dispersal of owls among DCAs. Movement among DCAs is necessary to maintain population levels and prevent genetic deterioration of the population. These guidelines also contain several recommendations for supplementing the DCA network in specific parts of the owl's range where conditions currently do not allow full implementation of the DCA network guidelines. This would be done by providing habitat for additional owl pairs and territorial single owls outside DCAs. In some areas, the draft recovery plan recommends management of these areas to reduce the risk of fire and insect damage. In total these matrix areas

in combination with the DCAs will provide for approximately 1,300 currently known pairs of owls on federal lands. This represents about 53 percent of all pairs currently known to occur on federal lands.

Suggestions for Management of Nonfederal Forestlands

The draft recovery plan relies first on federal lands for recovery of northern spotted owls. However, it also recognizes the role of nonfederal lands in recovery, particularly in areas where federal lands are not adequate to fully achieve the recovery objective. The recovery plan recommends specific contributions from nonfederal lands which will complement federal efforts. These recommendations reflect the varied conditions within individual provinces the authorities of the three states involved and the potential for enhanced cooperation with the private sector. They provide framework for development and implementation of creative efforts to help achieve recovery.

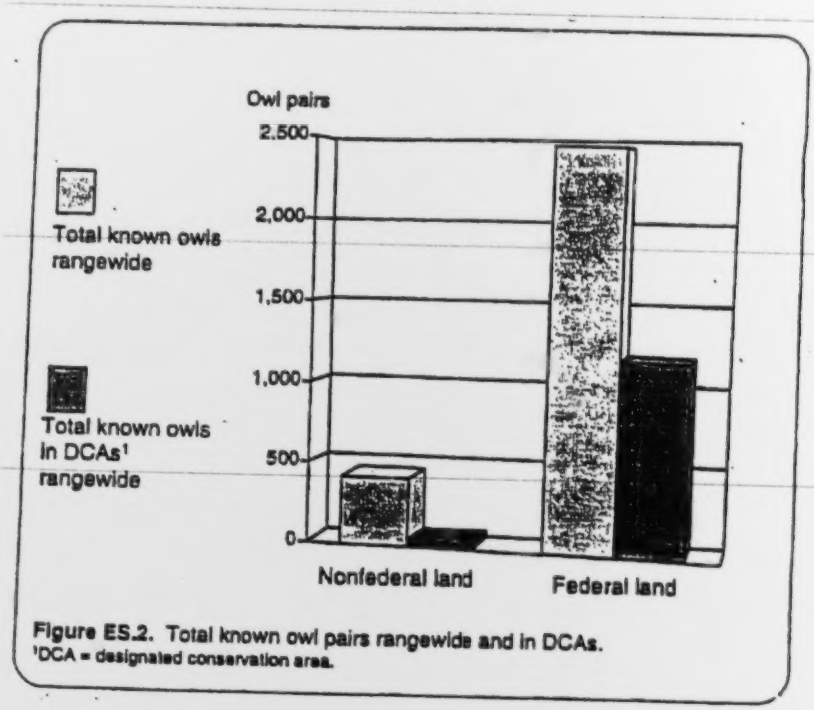


Figure ES.2. Total known owl pairs rangewide and in DCAs.
[1]DCA = designated conservation area.

Monitoring and Research Program

The draft recovery plan is based on extensive scientific data on northern spotted owls. This information gives the Recovery Team reasonable assurance that implementation of the draft plan will result in recovery of the species. However, increased knowledge of owls and their habitat will provide opportunities to refine and improve the plan. Consequently, the draft recovery' plan recommends a comprehensive monitoring, research, and adaptive management program. The program has two objectives:

1) It will help produce information to assist in refining management guidance and practices to promote recovery and, to the extent feasible, achieve greater economic efficiency and effectiveness. The program will include assessments of how implementation techniques are applied and the results they achieve.

2) It will provide documentation necessary to consider delisting the owl in part or all of its range.

Information derived from the monitoring and research program eventually may result in significant changes in the Recovery Team's recommendations. The Recovery Team has a long-term goal to move from a landscape composed of protected areas and matrix toward a landscape where conditions provide a more continuous distribution of owls. Results from monitoring and research may support such a change. In any case, the delisting criteria still would be appropriate even if specific recommendations changed.

Implementation Mechanisms

Recovery plans are not self-implementing under the Endangered Species Act. Instead, they are used by federal agencies as a guide to refine management plans, procedures, and strategies so that on-the-ground operations help achieve recovery as it is defined in the draft recovery plan. Nonfederal parties are not required explicitly to follow recovery

plans. However, they must follow applicable Endangered Species Act provisions that are reflected in the recovery plan. The draft recovery plan suggests an implementation schedule which, if followed, will expedite progress toward recovery and provide increased certainty and stability in owl management. Also, in recognition that actions are recommended which cover an extended time frame and involve federal and nonfederal parties, the draft recovery plan recommends establishment of a coordinating group to guide implementation efforts over the long term. The group would provide advice and assistance on policies, plans, and other aspects of management including monitoring and research.

The Scientific Basis for the Recovery Plan

The draft recovery plan is based on field studies of the habitat conditions that spotted owls prefer for nesting and breeding, on demographic studies, and on studies of owl behavior. It also is based on biological principles that describe the interactions within and among subpopulations that depend on areas of favorable habitat separated by areas of less favorable conditions. The Recovery Team drew substantially on theories and models of population dynamics to determine the desired size of population groups and the overall population.

The draft recovery plan also is based on silvicultural studies of the growth of forests under natural conditions and human management. Silvicultural models were used to study the opportunities for promoting more rapid development of suitable habitat conditions by appropriate management in younger stands.

Consideration of Economic and Social Effects

The draft recovery plan was designed to reduce economic and social costs without undermining recovery of the spotted owl. For example, it allows forest management within DCAs in areas that are unsuitable for owls if that manage meet is

designed to promote the development of suitable owl habitat. Some or that management may provide commercial wood products. It also uses much habitat already set aside as not suitable for timber harvest. The plan also provides programs and procedures to reduce the costs of its implementation. However, the cost of the plan still will be significant and disruption will be experienced by individuals and communities when restrictions on timber harvesting cause unemployment.

Implementation of the draft recovery plan is estimated to reduce employment in the Pacific Northwest timber industry by about 18,900 jobs, compared to the employment that would have been expected in 1995 with no protection of the spotted owl. Jobs in related sectors also will be reduced by about 13,200. Loss or reduced wages are estimated to be about $1.4 billion during the corning 2 decades. The value of the foregone timber harvest is estimated to be $470 million per year. This will cause a net reduction of about $328 million per yea: in U.S. Treasury funds and $100 million per year in county receipts. Private assets, such as mills and homes, also will .be reduced in value.

Conclusion

The conservation of northern spotted owls is a difficult public policy issue. It is important to achieve recovery in a way that is appropriate under the Endangered Species Act, yet also managerially and economically efficient. The draft recovery plan provides a realistic basis for meeting this objective. Consequently, it should meet owl needs and provide greater stability in resource management than now exists. This will set a precedent for constructively resolving conflicts between conservation and development of natural resources.

I.

A. The Northern Spotted Owl and the Endangered Species Act

1. How the Owl Came To Be Protected Under the Act

The U.S. Fish and Wildlife Service (FWS) first considered the possibility of listing the northern spotted owl (also refered to in the recovery plan as the spotted owl and the owl) under the Endangered Species Act in the early 1980s, but concluded that it would have been inappropriate. In 1987, a small organization known as GreenWorld, later joined by other environmental groups, petitioned the FWS to list the owl as endangered. The act's petition provisions required a preliminary finding within 90 days as to whether listing might be warranted. The FWS made a positive finding and initiated a review of the owl's status.

A second finding was required within 12 months of receipt of the petition. The second finding, directed at the question of whether listing was warranted, was more definitive than the 90-day finding. On December 17, 1987, the FWS found listing was not warranted.

The legality of the negative finding was challenged in court by several environmental groups, and the federal District Court in Seattle ruled that the finding appeared not to be supported by the status review that the FWS had conducted (see General Accounting Office 1989 for a review). When a judge ordered the FWS to produce a record that supported its decision the FWS requested and was granted time to reconsider its finding in light of the most recently available information, In April 1989, the FWS made a finding that listing was warranted. A proposal to list the owl as a threatened species was published in June 1989, and the owl was listed effective July 23, 1990.

2. The Endangered Species Listing Process

A process for ascertaining which species need attention is basic to any program of species conservation. Section 4 of the Endangered Species Act assigns this task to the Secretaries of the Interior and of Commerce, and operational authority within the two departments is delegated to the FWS and the National Marine Fisheries Service. The responsibilities and authorities for listing under the act are framed very broadly as the determination ". . . whether any species is an endangered species or a threatened species . . . ." Determinations are made by regulation through a proposal-and-comment process. In addition to this broad charge to the federal agencies to assess the status of species, the act provides a process for the public to petition for a species to be listed, and it makes the agencies accountable to petitioners. Some definitions are useful in understanding this assessment phase.

> "Species" means any species or subspecies of plant or animal and, in the case of vertebrate life forms, may include any distinct population segment.
>
> "Endangered species" means a species in danger of extinction throughout all or a significant portion of its range.
>
> "Threatened species" means a species likely to become endangered in the foreseeable future throughout all or a significant portion of its range.

The Endangered Species Act requires that listing decisions be made "solely on the basis of the best scientific and commercial data . . . ." In this context, "commercial data refers solely to information regarding trade in a species or products derived from it, and does not allow the probable economic consequences to affect a decision regarding a species' listing.

3. Critical Habitat Designation

The Endangered Species Act also directs the agencies to propose critical habitat to the maximum extent prudent and

determinable." Once again, the act's definitions are important.

> "Critical habitats" are specific areas within the geographical area occupied by a species at the time of listing on which are found those physical or biological features (1) essential to the conservation of the species: (2) which may require special management considerations or protection: and (3) specific areas outside the area occupied by the species upon a determination that such areas are essential to its conservation.
>
> "Conservation" means the use of all methods and procedures necessary to bring a species to the point at which the protective measures of the act are no longer necessary. Conservation is the process or means of achieving recovery. It is reasonable for the designation of critical habitat areas "essential to the conservation of the species" to consider the habitat needs identified in a recovery plan.

Designation of critical habitat is considered to be prudent when it would be of conservation benefit to the species for which it is designated. Critical habitat is determinable if sufficient information is available to adequately delineate the area or areas that should be included in the designation.

The act also requires an examination of the economic and other relevant impacts of the designation of critical habitat, and allows areas to be excluded from critical habitat if the benefits of exclusion outweigh the benefits of inclusion, unless exclusion would lead to the extinction of the species.

In the proposed and final listing of the northern spotted owl, the FWS deferred designation of critical habitat as "not determinable." Critical habitat must be designated to the maximum extent prudent and determinable at the time a species is listed. If critical habitat is not determinable at listing, the act allows an additional year beyond the one in which listing must progress from pro-posed to final. At the

end of the second year, critical habitat must be designated to the maximum extent prudent. In further consideration of the case that challenged the FWS's original petition finding, the court did not accept the FWS's argument that critical habitat for the owl was not determinable, and ordered the FWS to publish a proposal to designate critical habitat by April 29, 1991. A proposal for 11.6 million acres of critical habitat was published on May 6, 1991. A revised proposal that reduced the area to about 8.2 million acres, principally by excluding private, Indian, and state lands, was published on August 3, 1991, and a final designation of 6.9 million acres was issued on January 15. 1992.

4. Recovery Plans

The Endangered Species Act calls for the preparation of recovery plans for listed species that are likely to benefit from the effort, and authorizes the Secretary of the Interior to appoint recovery teams. A recovery plan must establish recovery goals and objectives, describe site-specific management actions recommended to achieve those goals, and estimate the time and cost required for recovery. A recovery plan is not self-implementing, but presents a set of recommendations endorsed by an approving official representing the Department of the Interior.

The Secretary appointed an interdisciplinary Northern Spotted Owl Recovery Team in February 1991. The Secretary's directive to the team (see Appendix K) called for a biologically credible plan. The Secretary further directed that the plan should, consistent with its legal mandate, "address concerns such as: potential community and regionwide economic and social impacts: fiscal implications at the local, state and federal levels: compatibility with other legal mandates; effects on other threatened and endangered species and those species which might be listed in the future: and broader, ecosystem-related considerations."

The Northern Spotted Owl Recovery Team includes members of federal agencies, academic scientists, and representatives from the governors' offices in California, Oregon, and Washington. The Recovery Team held meetings each month from March to September 1991 that were open to the public and then met in closed session while it developed final options and recommendations for the Secretary's review.

At its first meeting, the Recovery Team established standing committees to address particular aspects of preparing the recovery plan: members of the committees are shown in Appendix K. Committees were established for owl biology, planning and implementation, forest ecology and management, other species, and economics. An executive committee also was formed whose membership included the Recovery Team chairman, team coordinator, and all committee chairpersons. The committees gathered information and provided evaluations in their respective subject areas for presentation to and action by the full Recovery Team.

The Recovery Team held numerous meetings as a full team and in smaller committees working on specific matters. Members visited a wide variety of owl habitats and forests in the three states, including lands in the Mt. Hood and Six Rivers National Forests, Olympic National Park, the Bureau of Land Management Eugene District, the Yakima Indian Reservation, Oregon's Tillamook State Forest, and several privately owned commercial forests.

The Recovery Team's mandate and its inclusion of some members with back-grounds in areas other than the biological sciences make it unusual among recovery teams. This structure enables the Recovery Team to consider and, as appropriate, to reduce the cost of recovery. It is also significant that Congress agreed to Conference Report language accompanying the 1992 Interior and Related Agencies appropriation bill encouraging the Recovery Team to consider the social and economic impacts of the recovery plan.

B. The Interagency Scientific Committee

While the proposal to list the northern spotted owl was pending, the four principal federal agencies involved in management of the owl (Forest Service. Bureau of Land Management, Fish and Wildlife Service, National Park Service) commissioned an Interagency Scientific Committee (ISC) to develop a conservation strategy for the owl. The committee delivered its product in April 1990 in the form of a strategy organized around the establishment of habitat conservation areas (HCAs) throughout the range of the owl, including an adaptive management approach (Thomas et al. 1990). The ISC strategy represented a significant gathering and synthesis of information on the biology and conservation of the owl and provided a point of departure for much of what subsequently has occurred regarding owl conservation. The ISC report concluded that at that time management strategies were inadequate to ensure the owl's viability. The ISC believed its strategy, ". . . if faithfully implemented, has a high probability of retaining a viable, well-distributed population of northern spotted owls over the next 100 years," (Thomas et al. 1990:4).

In many respects the task of the Recovery Team is similar to that of the ISC. There are, however, several significant differences. The most fundamental differences concern the frames of reference of the two groups. When the ISC was formed and prepared its strategy, the owl had not been listed as threatened and was not subject to protection under the Endangered Species Act. The strategy was commissioned by federal agencies, and members of the core committee of the ISC were federal employees. The committee had no obligation to and did not attempt to articulate its strategy in terms of the owl's recovery from threatened status.

The Recovery Team began its work after the owl had been listed. Protective measures had taken effect and were available as tools for conservation. The Recovery Team, appointed

by the Secretary of the Interior, includes in its core membership academic scientists and representatives of the governors of the three affected states. Direct participation at this level by the state gave the Recovery Team a greater opportunity to address the entire range of the owl and management of owls on nonfederal lands than was afforded the ISC. Perhaps most important, a recovery team must, if possible, develop goals for the recovery of a species to the point at which it may be removed from the endangered or threatened list and also must describe criteria by which achievement of these goals can be recognized.

Similarities between the ISC strategy and this recovery plan arise from their common foundation in the biology of the owl and reliance on available management tools and principles of conservation biology. Differences between the two reflect the differing composition and charters of the groups that prepared them.

C. The Biological Basis of the Plan

The conservation measures in the recovery plan reflect general biological principles and specific knowledge concerning the biology of the northern spotted owl. In large part, the plan borrows from and builds upon the concepts and information presented in the ISC strategy. The following principles provide a biological basis for the plan:

- The risk of local or widespread extirpation will be reduced by managing for owls across their entire range and in the variety of ecological conditions within that range.
- Emphasis should be placed on management for clusters, or local population centers, of owls habitat blocks rather than for individual pairs.
- Habitat conditions and spacing among local populations should provide free movement of owls to allow a metapopulation structure to operate.

For the owl, these principles result in recommendations for a) a network of designated conservation areas (DCAs) sufficiently large when possible to support 20 pairs of owls each, b) management within DCAs to maintain or increase suitable habitat for owls, and c) management to allow owls to move among DCAs. The size and arrangement of DCAs are based on information about the size of territories established by pairs of owls and the ability of owls to disperse. Knowledge of habitat characteristics needed to support owls provided a basis for recommending management of forestlands to support recovery. Throughout the plan, recommendations are tailored to locally specific information. Organization of recovery around multipair habitat areas is particularly appropriate for this species because of knowledge of its behavior, which includes significant inter-pair interaction.

In addition to owl conservation, the recovery plan considers the biology and conservation needs of other species that occur within the range of the owl. The recovery plan incorporates elements to benefit other species and general ecosystem values when doing so adds little or no additional cost while conserving the owl.

D. The Means of Achieving Recovery

The recovery plan recommends an approach to owl recovery that involves federal, state, and private sectors. The underlying strategy is interactive, and accordingly, recommends management objectives and practices consistent with the various implementation mechanisms available among these sectors, The Recovery Team believes this approach is the most efficient and effective means to achieve recovery. At the same time, however, the Recovery Team under-stands that the statutory mandates of the recovery planning process and the Endangered Species Act impose different requirements on land managers and owners. Accordingly, the recommendations place strong emphasis on the need for appropriate federal land management as a basis for recovery. As the plan

is implemented, achieving or exceeding recommended state and private commitments in some physiographic provinces may hasten recovery, and perhaps ultimately enable greater flexibility in federal management than the plan now envisions. In other provinces, however, particularly where obstacles to recovery are acute, flexibility is not likely to be possible in the immediate future.

E. Sources of Information

Both published and unpublished documents (unpublished documents are commonly referred to as "grey literature") have been used as references in this plan. Grey literature has not been subjected to formal, rigorous peer review, and thus its acceptability among scientists as a source of information from which inference can be drawn is low. Likewise, published documents vary in their utility as sources of information. In general, popular articles (e.g., those in newspapers and magazines) have the lowest value as sources of unbiased information. With one exception, none is cited in this review. Privately published works and many government documents are not usually formally reviewed and often are referred to as grey literature. Peer-reviewed scientific journals, symposia, and books form the backbone of scientific literature. While peer review cannot, in most cases, assure the credibility of raw data, it does assure the reader that the information has been subjected to rigorous scrutiny of its methods, analysis, logic, and the appropriateness of an author's inferences and conclusions given the quality and amount of data and the analytical tools used to evaluate the data. In the case of the northern spotted owl, much of the available information is found only in grey literature. Grey literature frequently has been used in this document because it often represents the very latest field data. In addition, to categorically reject grey literature would result in a virtual absence of information derived from the timber industry. Use of such information

should result in a more informative review and a stronger recovery plan.

F. Acknowledgments

The Northern Spotted Owl Recovery Team has been assisted in its work by a legion of able cooperators. Many of these people volunteered their time and efforts in excess of what anyone could have plausibly expected, and have endured schedules and deadlines that can only be described as unreasonable. The list below is undoubtedly incomplete, and the Recovery Team regrets any omissions. To all named and any unnamed collaborators, we express our gratitude; we could not have completed our work without their contributions. James K. Agee, David Allen, David Anderson, Brad Andres, Keith Aubry, Phil Aust, Robert W. Baker, Allison Banks, Timothy A. Barnes. Joseph Beatty, Gary Benson, Marty Berbach, Bill Beyers, Monte Bickford, Bruce Bingham. Kevin Birch, Helen Birss, Andrew Blaustein, Kathryn Boula, Nancy Brooks. Charlie Brown, Ken Burnham, Bruce Bury, Andrew Carey, Jill Carroll, John Charbonneau, Steve Corn, Eric Cummins, Tom Cyra, Larry Davis, William F. Delaney, Velma Delp, Nicholas Dennis, Randy Dettmers, Lowell Diller, Aimee Dour. James Eby, Ed Ehlers, Rich Everett, Robert A. Ewing, Lee Folliard, Eric Forsman, Louise Fortmann, Alan Franklin, Terrence Frest, Florissa Fuentes, Bob Cara, Keith Gilless, Brian Greber, Jeff Grenier, John H. Grobe, Tom Hamer, Michael Hamel, Melissa Hamel, Jeff Hannum, Mark Harmon, Connie Harrington, Michael Hay, Mauragrace Healey, Lorin Hicks, Patrick Higgins, Jerry Hoyer, Robert J. Hrubes, Mark Huff, Larry Irwin, Frank Isaacs, Kirk Jobeson, K. Norman Johnson, Rebecca Johnson, Connie Kahn, Boone Kaufmann. Jon Kennedy, Steve Kerns, Walt Knapp, William LaHaye, Jack Lattin, Robert G. Lee, George Leitner, Gary. Lettrnan, Rob Lewis; Joe Lint, Bruce Lippke,'Dan Luoma, Mike Lunn, Tom Lynch, Kathy Majors, Bruce Marcot, Sandy Martin, Bill McComb, Kevin

McKelvey, William McKillop, Walter J. Mead, Chuck Meslow, Joe Meyer, Nanette Miller, Christine Moen, Andrew Moldenke, Jeff Morrell, Peter Morrison, Robert Motroni, Barry Mulder, Ed Murphy, Gil Murray, Jim Neely, Susan Nelson, Bill Nietro, Barry Noon, Theron Odell, Kathy O'Halloran, Chad Oliver, Tom Owen, Dave Perry, Rick Peterson. Malcolm Pious, Ann Potter, Terry Raettig, Martin Raphael, Richard Reynolds, Jo Ellen Richards, Paul Roush, Frank Ryals, Bob Saunders, Mel Schamberger, Steve Self, Mike Skinner, David Solis, Paul Sommers, Tom Spies, Mike Srago, Argon Steel, John Steffenson, Dave Steve, Robert Storm, John Teply, Steve Tesch, Jack Ward Thomas, Dale Thornburgh, David Thorud, Melvie Uhiand, Jerry Verner, Frank Wagner, Paul Warner, Bill Watterson, Phil Weatherspoon, Thomas Williams, Wendell Wilson, George Wyatt, Cindy Zabel, and John Zasada.

No project like this one comes to fruition without exacting a toll on the participants' personal support groups of family and friends. We appreciate the indulgence of those closest to us, who have put up with our frequent physical and mental absences during the preparation of this recovery plan.

Northern goshawks (*Accipiter gentilis*) also prey on adult and juvenile spotted owls (Forsman et al. 1984, Gutierrez et al. 1985, Miller 1989, Johnson 1991 pers. comm.). Nevertheless, spotted owls will nest within a goshawk territory (Forsman et al. 1984) and will defend their young against attacks by goshawks (Gutierrez unpub. data). Thus. goshawks probably are not serious threats to spotted owl populations.

Until recently, people rarely have encountered spotted owls and there has been no historic persecution by humans of this docile creature. The recent, conspicuous rise in spotted owl deaths at the hands of humans is a potential threat to local owl populations.

Diseases and Parasites

Disease and parasite infections represent another form of interspecific interaction because it is the relationship (in the broad biological meaning) of one organism with another. However, the topic of pathogens is treated separately here because it is treated separately in status analyses by the FWS when listing a species as threatened or endangered.

Relatively little is known about the diseases and parasites of spotted owls. Gutierrez (1989) conducted an extensive survey of hematozoan parasites (those that live in the blood) among all three subspecies of the spotted owl. Of the six hematozoan species found, all but one species occurred in the northern spotted owl. The infection rate was 100 percent, which was one of the highest rates of infection by these parasites recorded among birds (Greiner et al. 1975). However, spotted owls must be adapted to carry these high parasite loads because their survival rates are very high where infection rates are high (e.g., northwestern California, see following text). Hoberg et al. (1989) examined 20 northern spotted owls for helminth (worm) parasites and found eight species, representing nematodes (round worms), cestodes (flat worms), and acanthocephalans (spiny-headed worms). More than 80 percent of the birds were infected with at least one species: and multiple infections were common. Young et al. (In Review) reported two hippoboscid fly (louse) species from spotted owls in northwestern California. One species of fly was recorded only once among the 382 owls examined, but approximately 17 percent of the owls they examined were infested by the other species. Fly densities on owls were higher in years of higher summer and fall temperatures and lower winter precipitation. The authors speculated that low temperatures may have de-pressed survival of fly pupae: Finally, Forsrnan (pers. comm.) observed two nests where owlets had such high infestations of hippoboscids that the flies caused severe trauma to the young birds.

Habitat

Habitat selection and its context: Perhaps the most controversial aspect of the natural history of the spotted owl concerns its habitat requirements. Thomas et al. (1990:143-144) discussed the complex habitat needs of the northern spotted owl.

Most species exhibit variation in habitat selection (i.e., most species are not strict habitat specialists). Spotted owls are known to use many habitats. Empirical observations of spotted owls in different habitats can provide under-standing of the birds' habitat requirements at three different levels (Peek 1986). Habitat use is the simple observation of an animal in a habitat without under-standing the context of the observation. Habitat selection is the choice of a. habitat or habitats among those that are directly available to the animal. Habitat preference is the selection of habitat that would be made by an animal if all habitats were available to the animal. Thus, we have many observations of spotted owl habitat use, fewer studies of habitat selection, and no studies of habitat preference as defined by Peek (1986). Early studies portray the northern spotted owl as a denizen of primal forests (Grinnell and Miller 1944) based on observations of habitat use. However, Grinnell and Miller (1944) found that geographic variation in habitat use did exist in spotted owls. Subsequent investigations (Forsman 1976, 1980, Solis 1983, Forsman et al. 1984, Gutierrez et al. 1984, Solis and Gutierrez 1990, Sisco 1990, Blakesley et al. In Press, Bart and Forsman 1992) reaffirmed the naturalists' notions from observations of habitat use, but more importantly, provided analyses of habitat selection. Recent surveys of managed previously logged private lands) forests have added to the knowledge of habitat use (Diller 1989, Irwin et al. 1989a, 1989b, Kerns 1989, Pious 1989). These latter observations are important, but their ecological significance is enigmatic because, unlike studies conducted on public land, there is no supporting

demographic information. It is essential that more demographic information be gathered to evaluate these populations (see section on spotted owl use of young. managed timberlands).

Variation in habitats used: Spotted owls are known to nest, roost, and feed in a wide variety of habitat types and forest stand conditions throughout their distribution (see discussion of suitable habitat elsewhere in this document). Spotted owls use western hemlock, mixed evergreen, mixed conifer, Douglas-fir. redwood, Douglas-fir/hardwood, evergreen hardwood, ponderosa pine, western red cedar, and other forest types in different parts of their range. Most observations of spotted owl habitat use have been made in areas having a component of old-growth and mature forests (Solis 1983, Forsman et al. 1984, LaHaye 1988, Sisco 1990, Ward 1990, Zabel et at. In Prep.: see additional summaries in Thomas et al. 1990). However, observations of spotted owls in managed (i.e., previously logged) stands are commonplace (Diller 1989, Kerns 1989, Pious 1989). Studies evaluating habitat selection show owl selection for mature and/or old forest stands with concomitant selection against young stands (Forsman 1980, Solis 1980, Carey et al. 1990, Blakesley et al. In Press). Selection for forest stands of intermediate age and size vary among the owls studied.

Nesting habitat: Most northern spotted owl nest sites observed on public lands have been located in old growth or mature forests (Forsman et al. 1984, LaHaye 1988). In addition, the proportion of older seral stage forest surrounding nests has been significantly greater than it was in surrounding random sites in the same area (Meyer et al. 1990, Ripple et al. 1991). In areas of private managed forest, particularly in the California Klamath and California Coast physiographic provinces, where some uneven-aged silviculture has occurred or where fast tree growth facilitates rapid habitat development, spotted owls are known to nest in managed stands, especially

if residual old-growth characteristics are present (Forsman et al. 1977, Diller 1989, Pious 1989, Thomas et al. 1990; see Appendix B).

Spotted owls do not build their own nests; they depend upon suitable naturally occurring nest sites. In older-age forests, owls tend to nest in broken-top trees and cavities; they use platforms (i.e., abandoned raptor nests, squirrel nests, mistletoe brooms, debris accumulations) less frequently (Forsman et al. 1984, LaHaye 1988). In younger forests (i.e., forests less than 150 years old), nests more frequently are found on platforms (LaHaye 1988, Irwin et al, 1989a, Buchanan 1991). In one California study (LaHaye 1988), the proportion of platform nests used by spotted owls increased north to south, but the trend probably is related to the distribution of stand ages in that study rather than latitude.

The presence of suitable nest sites has been hypothesized as one possible basis for the use of old-growth by spotted owls (Forsman et al. 1984), However, owls also use a variety of nest sites in younger-aged stands. But one critical piece of information should be assessed before this hypothesis can be tested. That is, the relative nesting success of birds using cavities and broken-top sites should be compared to that of birds using the presumably structurally less stable debris platforms. In any event, artificial nest sites probably could be provided for these birds (Madison and Woodbridge pers. comm.). European owls in the genus Strix readily use nest boxes (Southern 1970, Saurola 1989). If spotted owls behave in a similar fashion to other Strix owls, the availability of nest sites probably is not a critical management problem. However, a critical study of nest-box acceptance by spotted owls has not been conducted.

Several studies have been conducted on the structure of spotted owl nesting habitat (LaHaye 1988, Buchanan 1991, Self and Nelson 1991 pers. comm.). In the two studies that compared nest sites with available habitat one in unmanaged

forest and the other in managed forest (LaHaye 1988 and Buchanan 1991, respectively), owls nested in forests that differed from what was available to them, suggesting selection by the owls. In general, owls preferentially used forests with greater complexity and structure. Nesting habitat structure reported by Self and Nelson in managed forests (1991 pers. comm.) was strikingly similar to the habitat structure used by foraging spotted owls in unmanaged stands within the same province (Solis 1983).

Roosting habitat: Northern spotted owl roosting habitat has been described by Forsman (1976), Barrows and Barrows (1978), Forsman (1980), Solis (1983), Forsman et al. (1984), Chavez-Leon (1989), Sisco (1990), and Blakesley et al. (In Press). Roost sites are typically areas of relatively dense vegetation (high canopy closure dominated by large-diameter trees). During the summer these sites are usually cool, shady spots near streams or are on the lower third of slopes (possibly a simple correlation with stream position; Forsman 1976, Solis 1983, Blakesley et al. In Press). Spotted owls respond to variation in temperature and exposure by moving within the canopy to find favorable microclimate conditions (Forsman 1976, Barrows and Barrows 1978, Forsman 1980, Barrows 1981, Solis 1983, Forsman et al. 1984). The multi-storied stand structure of roost sites facilitates this movement. Because of this observed behavioral response to variation in temperature, it has been hypothesized that old-growth forests are necessary to spotted owls for them to avoid heat stress (Barrows and Barrows 1978). However, Gutierrez (1985) pointed out that there are other plausible hypotheses to explain the associated owls with old-growth.

Foraging habitat: Of the major spotted owl habitat categories, feeding habitat appears to be the most variable (summarized in Thomas et al. 1990). This is predictable given the highly variable distribution and abundance patterns of the owl's primary prey (Ward 1990). Within a given geographic

province, foraging habitat may be more variable than either nesting or roosting habitat. Nevertheless, spotted owl foraging habitat is characterized by high canopy closure and complex structure. Comparisons of habitat among unmanaged stands used by foraging owls and managed stands occupied by nesting owls shows a surprising concordance of structural habitat features in California (Appendix B).

Solis and Gutierrez (1990) presented evidence that male and female spotted owls may segregate their foraging habitat. The smaller males appeared to be using stands that had higher tree density than were the larger females, which foraged in less dense habitats. Earhart and Johnson (1970) suggested that differential habitat use by male and female owls may occur because the high wing loading of the females would make them less maneuverable than males. However, this probably would be a consequence rather than a cause of re-versed sexual dimorphism (Muller 1986, Solis and Gutierrez 1990).

Spotted owl use of young, managed timberlands: The significance of the owl's relationship to old-growth forests (sensu Old-growth Definition Task Group 1986) is obvious: old-growth forests are declining rapidly throughout the owl's range as a result of logging (Thomas et al. 1990, USDI 1990). If northern spotted owls are ecologically dependent (Ruggiero et al. 1988) on old-growth or mature forests, then continued logging of their habitat will lead to the probable extinction of the population (Thomas et al. 1990, USDI 1990). However, Forsman et al. (1977), Forsman (1988b), and Hays et al. (1989) reported spotted owls occupying young, managed stands at lower densities than in old-growth stands. A managed stand is defined in a broad context, that is, managed stands in which cutting of trees has occurred. This clarification is necessary because there are no examples of forests in which logging or silviculture has occurred where the response of owls is documented experimentally. Further, Forsman (1980), Solis (1983), Forsman et al. (1984). LaHaye (1988),

Chavez-Leon (1989), Solis and Gutierrez (1990), and Sisco (1990) describe habitat used by northern spotted owls in both old-growth and mature stands. Their descriptions of mature forest structure used by spotted owls is similar to the structure of uneven-aged managed forests in northwestern California (Appendix B). Thus, it is not surprising that spotted owls are being observed in younger managed timberlands throughout the distribution of the subspecies (Diller 1989, Irwin et al. 1989b, 1989c, Kerns 1989, Pious 1989). There is hierarchy of information needed to assess and understand these observations of owls in managed forests. In order of increasing importance, these classes of information are 1) presence of individuals, 2) presence of pairs, 3) density, 4) variation in reproduction, 5) survival schedules, 6) dispersal patterns, 6) ratio of internal to external recruitment. and 7) population stability. The structure and proportions of habitats used by owls relative to available habitats are also necessary to evaluate the observations. Finally, future harvest patterns must be known and must accommodate owl needs in order to predict the effects of the logging activities on the birds inhabiting these managed timberlands.

On one side, this habitat variation argues that spotted owls are not habitat specialists. On the other side, it suggests that spotted owls show adaptive responses to regional variation in environmental conditions. Regional variation in habitat selection by owls does not indicate that they will respond positively to any human-induced habitat changes in one part of their range that lead to habitat conditions similar to those used by owls in other parts of their range. An additional problem in assessing variation in habitat use is the lack of a consistent definition of vegetation seral stage classification (see Table F1 in Thomas et al. 1990). Terms such as "old-growth, mature, young age, unmanaged, managed, second-growth" are defined in the literature using different parameters and criteria. This impedes rather than facilitates communication among interested persons.

Owls in managed forests within the California Klamath and California Coast provinces usually occupy stands with high structural diversity, high canopy closure, and either large-diameter trees or residual old trees (Appendix B). These stands are usually more than 60 years old after partial logging events of the past (Thomas et al. 1990). For example, stands in the redwood region of the California Coast province described by Kerns (1989) have a structure similar to unmanaged (i.e., not previously logged) mature stands occupied by owls in a nearby national forest (Solis and Gutierrez 1990). Apparently, the fast growth of redwood trees, presence of understory hardwood trees, and the remnant old trees within the stands facilitate rapid structural development of these coastal forests. Critical aspects yet to be estimated in previously harvested forests are the survival, recruitment, dispersal, and reproductive patterns of these birds relative to conspecific populations in unlogged forests.

APPENDIX P

IN THE UNITED STATES
COURT OF FEDERAL CLAIMS

No. 01-432 L

MARSHA SEIBER AND ALVIN SEIBER,
Plaintiff,

v.

THE UNITED STATES OF AMERICA,
Defendant.

DECLARATION OF VICKI M. FINN

I, Vicki M. Finn, pursuant to 28 U.S.C. § 1746, hereby declare as follows:

1. I am the Chief of the Endangered Species Program in the Regional Office, U.S. Fish and Wildlife Service (Service), Portland, Oregon, and have held that position since 1997. I have been employed with the Service since 1989.

2. I am responsible for the administration of the Endangered Species Act (ESA) in Region 1 of the Service. Region 1 includes the States of Washington, Oregon, California, Idaho, Nevada, and the Pacific Islands. I oversee the implementation of Endangered Species Act section 7 Federal consultation program, section 4 listing program, section 10 permitting program, and section 4 recovery program.

3. I supervise the Regional Office biologist responsible for processing the incidental take permit application submitted by Mr. Alvin and Mrs. Marsha Seiber. As such, I am familiar with the Service permit files in the matter. The statements in this declaration are based upon my personal knowledge and review of the Service's records in my custody and control.

True copies of the documents from the Service's permit records regarding the Seibers' permit application references herein are attached to my declaration.

BACKGROUND ON THE ESA INCIDENTAL TAKE PERMIT PROCESS

4. Pursuant to Section 9 of the ESA, 16 U.S.C. § 1538, take of any endangered or threatened species is prohibited unless authorized by regulation or permit. "Take" under the ESA is defined to mean to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture or collect, or to attempt to engage in any such activity. 16 U.S.C. § 1532(19). "Harm" includes habitat modification that injures a listed species. 50 C.F.R. § 17.3. The ESA provides civil and criminal penalties for violating the prohibition on take. 16 U.S.C. § 1540(a),(b).

5. Section 10 of the ESA provides a process by which a person may obtain a permit to engage in the incidental taking of a listed species. 16 U.S.C. § 1539(a). In order to obtain an incidental take permit, an applicant must provide a habitat conservation plan (HCP) that specifies the impact that will likely result from the taking, the steps the applicant will take to minimize and mitigate such impacts, the funding available for such mitigation, alternative actions considered and the reasons they were not used, and any other measures the Secretary may require as necessary or appropriate. 16 U.S.C. § 1539(a)(2)(A).

6. The Secretary is required to publish notice of an incidental take permit application in the Federal Register and allow 30 days for interested parties to submit comments prior to making a decision on the application. 16 U.S.C. § 1539(c).

7. To issue a permit, the Secretary must find that: the taking will be incidental; the applicant will, to the maximum extent practicable, minimize and mitigate the impacts of such taking; the applicant will ensure that adequate funding for the HCP will be provided; the taking will not appreciably reduce

the likelihood of the survival and recovery of the species in the wild; any other measures required by the Secretary as necessary or appropriate will be met; and the Secretary has received such other assurances as he or she may require that the HCP will be implemented. 16 U.S.C. § 1539(a)(2)(B). If a person complies with the requirements of the incidental take permit, any otherwise lawful incidental taking of a listed species covered by the permit will not violate Section 9 of the ESA. 16 U.S.C. § 1539(a)(1)(B).

8. The Endangered Species Habitat Conservation Planning Handbook ("Handbook"), issued jointly by the Service and the National Marine Fisheries Service in 1996, sets forth the application process. Def. Ex. A. In general, there are three phases of the application process: 1) the HCP development process; 2) the formal permit processing phase; and 3) the post-issuance phase. Handbook, at 1-5. Usually, in the first phase the permit applicant will work with the Service in order to develop a conservation plan that will satisfy the requirements of the ESA. The Handbook explains the importance and value of pre-application coordination and the benefits to the applicant when the Service provides technical assistance during development of the HCP. Handbook, at Chapter 3. The Handbook also points out that Congress intended the Service to not just be a regulator of the HCP program, but an active participant in providing technical assistance. Handbook, at 3-1, citing H.R. Rep. 97-835, 97th Congress, Second Session.

THE SEIBERS' INCIDENTAL TAKE PERMIT APPLICATION

9. On November 26, 1999, my office received an Incidental Take Permit Application, HCP, Implementation Agreement, and $25 filing fee from Mr. Philip Chadsey, legal counsel representing the Seibers. The permit application package requested authorization to incidentally take the northern

spotted owl (Stria occidentalis caurina) by logging 40 acres, known as the Wiley Creek unit, which is part of an approximately 200-acre parcel in Linn County, Oregon. Def. Ex. B. The northern spotted owl is listed under the ESA as threatened. 55 Fed. Reg. 26194 (June 26, 1990).

10. While the Wiley Creek Unit is not designated as critical habitat under section 4 of the ESA, the take prohibitions pursuant to section 9 still apply. The ESA requires the Service to take into consideration the economic and other relevant impacts of designating a specific area as critical habitat and provides for exclusion of an area if the benefits of exclusion outweigh the benefits of inclusion. 16 U.S.C. 1533 (b)(2). The only regulatory effect of designating an area as critical habitat is under section 7 of the ESA, which requires federal agencies to ensure that their actions are not likely to destroy or adversely modify critical habitat. 16 U.S.C. § 1536(a)(2). To help reduce the overall impacts of critical habitat designation for the northern spotted owl, the Service excluded all non-federal lands because designation of such lands would have been of little additional conservation benefit since non-federal land management actions are not generally subject to section 7. 57 Fed. Reg. 1769, 1808 (Jan. 15, 1992). However, the final rule designating critical habitat for the spotted owl specifically explained that areas not included in critical habitat may still be important to species' conservation and may be addressed under other ESA provisions, including section 9 which prohibits intentional and non-intentional "take" of a listed species regardless of whether or not the lands are within critical habitat. Id. at 1797, 1825. It also stated that other measures on non-federal lands, such as habitat conservation plans, could provide greater conservation benefits to the owl than that provided by critical habitat designation. Id. at 1808.

11. The Wiley Creek unit lies at the center of a large area of the western portion of the Western Cascades spotted owl

ecoprovince–from the North Fork Santiam River south to the McKenzie River–that has little Federal ownership except for a few small, scattered parcels such as the Wiley Creek Late Successional Reserve. *See* Def. Ex. C. Spotted owl conservation strategies based upon landscape level planning recognize that non-federal lands, especially in areas lacking or containing limited Federal ownership, may be integral to these strategies since they support nesting owls as well as provide for movement of owls between Federal lands. See e.g., Def. Ex. D at 11-93. The presence of spotted owls and suitable habitat within the Wiley Creek unit can facilitate spotted owl dispersal to and from Federal lands, in both north-south and east-west directions.

12. In my experience, the vast majority of incidental take permit applications are submitted after the Service and the applicant have worked together to develop a permit application package, as described in the Handbook. See para. 8, above. Neither the Seibers nor Mr. Chadsey requested technical assistance from the Service in preparing the application or any other pre-application coordination.

13. In their permit application, the Seibers proposed harvesting approximately 40 acres of mature second growth forest which is part of a 200-acre parcel. Approximately 150 acres of this 200-acre parcel are forested. At the time of the application, the 40 acres proposed for harvest by the Seibers were delineated by the Oregon Department of Forestry pursuant to the Oregon Forest Practices Act as a portion of an approximately 70-acre spotted owl core area. The remaining approximately 30 acres are located immediately to the north on adjacent private property. A spotted owl nest tree is located within about 300 feet of the northern portion of the property on adjacent private land. A pair of spotted owls was associated with this site from 1991 through 1996. Spotted owl surveys also documented responses in this area in 1999 and 2000.

14. The only minimization and mitigation measures proposed by the Seibers' HCP were to: conduct harvest activities outside of the nesting season for the spotted owl except for roadbuilding; replant the harvest unit; maintain riparian buffers as required by the Oregon Forest Practices Act; and retain snags and standing dead trees, except when they provide a safety hazard. In listing the northern spotted owl, the Service had determined that "existing regulatory mechanisms were insufficient to protect either the northern spotted owl or its habitat." 55 Fed. Reg. at 26114. However, aside from the seasonal restriction, the Seibers proposed only those measures which would have been required by state law in the absence of a spotted owl core area, despite the presence of a portion of a core area on their property. Furthermore, since harvest was proposed to take place prior to the commencement of the nesting season, the seasonal restriction would have provided no actual benefit.

15. In a January 3, 2000, letter, the Seibers' attorney, Mr. Phillip D. Chadsey, asked the Service to advise him within 10 days when the Federal Register notice initiating the public review period would be published. Def. Ex. E. The Service replied on January 11, 2000, that we were processing the permit application in our ordinary course of business and would inform him of any pending actions. Def. Ex. F.

16. On January 25, 2000, two Service biologists from the Oregon Fish and Wildlife Office met with Mrs. Seiber to assess existing habitat conditions and evaluate additional options to minimize and mitigate impacts to northern spotted owls. However, in a February 2, 2000, letter from Mr. Chadsey, the Service was informed that there would be no changes in the Seibers' HCP and threatened legal action if the Service did not publish the Federal Register Notice initiating the public comment period by February 15, 2000. Def. Ex. G.

17. A February 7, 2000, letter from Department of the Interior Regional Solicitor Lynn Peterson, writing on behalf

of the Service to Mr. Chadsey, informed him that the permit application lacked much of the biological analysis and information routinely provided by other applicants. This letter also informed him that the HCP Handbook identifies steps that incidental take permit applicants may pursue to assist the Service in processing applications as expeditiously as possible. In addition, this letter stated that the Service remained willing to work with the Seibers, through Mr. Chadsey as he had requested, to discuss modifications to the permit application which would have allowed for expedited processing. Def. Ex. H. The Service then received a February 9, 2000, letter from Mr. Chadsey stating that the Seibers had no desire to discuss modifications to the permit application and that if the Federal Register notice was not published by February 15, 2000, they intended to file a mandamus action. Def. Ex. I.

18. On February 18, 2000, the Service published a Federal Register notice advising the public that we had received an incidental take permit application from the Seibers and requesting comments on the application within 30 days. In the notice, the Service expressed its concerns with the adequacy of the minimization and mitigation measures in the permit application package. The Service also presented other alternatives which we believe would have minimized and mitigated the incidental take of owls. Def. Ex. J. The Service received two comments in response to the Federal Register notice, both of which opposed issuance of the permit.

19. On July 6, 2000, the Service denied the Seibers' permit application because it did not meet the permit issuance requirement that the applicant minimize and mitigate the impacts of take to the maximum extent practicable. The Service determined on the record before it that the minimization and mitigation measures presented by the Seibers' HCP were not commensurate with the potential impact of incidental take, were not the maximum extent practicable, and were not based upon sound biology. The letter also provided

two examples of smaller-sized forest landowners who applied for and received incidental take permits for northern spotted owls, and included a brief description of those habitat conservation plans. In addition, the Service suggested the general outlines of four harvest alternatives that would have provided a basis for issuing an incidental take permit. In summary, those four alternatives were: 1) selective harvest of the 40 acres to maintain spotted owl habitat; 2) harvest that eliminates suitable habitat for a period of time, but with a commitment to regenerate and maintain some level of suitable habitat in the future; 3) harvest alternatives that manage the entire Seiber property as a unit; and, 4) harvest alternatives outside the 40 identified acres, with the 40 acres serving as mitigation. The Seibers were further advised that they had the latitude to devise alternatives that met their specific management objectives while providing an appropriate level of mitigation for any spotted owl incidental take. The Service again offered to provide technical assistance to the Seibers in developing alternatives that would meet the permit issuance criteria contained in section 10 of the ESA. Def. Ex. K.

20. On July 28, 2000, Mr. Chadsey submitted a request for reconsideration of the permit denial, in accordance with the Service's permitting regulations. 50 C.F.R. § 13.29. Def. Ex. L.

21. The Service denied the request for reconsideration on September 12, 2000, because it did not present any new information or facts regarding the reason for the Service's initial denial and did not propose any modifications to their HCP. The Service again offered technical assistance to the Seibers to identify alternatives to satisfy the incidental take permit issuance criteria and meet their timber management objectives, and stated our belief that, through cooperation, we could develop a resolution to this matter. Def. Ex. M.

22. In accordance with the Service's permitting regulations, Mr. Chadsey submitted an appeal of the denial to the Service's Regional Director on September 26, 2000. Def. Ex. N.

23. The Service denied the Seibers' final appeal to the Regional Director on November 9, 2000. The Service again explained that, in the absence of any new information or modification of the HCP proposal, the Service had no basis for determining that the permit issuance criteria were satisfied. Acknowledging that the Seibers had previously declined assistance from the Service to develop their HCP application, we again offered our assistance in developing an improved HCP. Def. Ex. O.

24. On August 7, 2001, we received a letter from Mr. Chadsey informing us that the State of Oregon no longer considered the owl site occupied and asking us if we would oppose harvest of the subject timber. Def. Ex. P.

25. On September 12, 2001, the Service informed Mr. Chadsey that, under the spotted owl survey protocol used by the Service, the site was characterized as having "resident single status." Def. Ex.Q. Under this protocol, a site may be considered unoccupied after there are no owl responses for three years. Def. Ex. R at 4. The Service stated that the documented presence of a northern spotted owl in the vicinity of the Seibers' property in two of the last three years suggested that timber harvest still presented a risk of incidental take. An incidental take permit is not required in order to harvest timber, rather an incidental take permit authorizes taking of spotted owls incidental to lawful logging. The Service again offered to provide technical assistance in developing a permit application meeting issuance criteria. The Service further informed the Seibers that should they decline to accept our offer and choose to proceed with logging without an incidental take permit, any take of owls which did occur would not be authorized under the ESA.

26. On September 19, 2001, Mr. Chadsey sent another letter asking why we did not issue the incidental take permit they requested. He stated that we had never indicated how the application did not meet permit issuance criteria. He also inquired how the Seibers can meet the Section 10 permit issuance criteria. Def. Ex. S.

27. Our September 28, 2001, reply referred the Seibers to our letters of July 6, September 12, and November 9, 2000, which specifically addressed our reasons for denying the permit application. We again described what we considered were four approvable alternatives, and noted that many other alternatives exist and that we were ready to provide technical assistance to help the Seibers decide for themselves which alternative works best for them. Def. Ex. T.

28. It is important to note that the Service has not prevented the Seibers from logging their property. The Service has not imposed any type of injunction preventing the Seibers from logging. The Service was not able to issue an incidental take permit because the permit issuance criteria had not been met, but the Service has made repeated attempts to work with the Seibers to develop a solution that would allow the Service to issue an incidental take permit. Without the permit, the Seibers may still harvest their timber, but may risk violating the prohibition against take of a listed species contained in section 9 of the ESA.

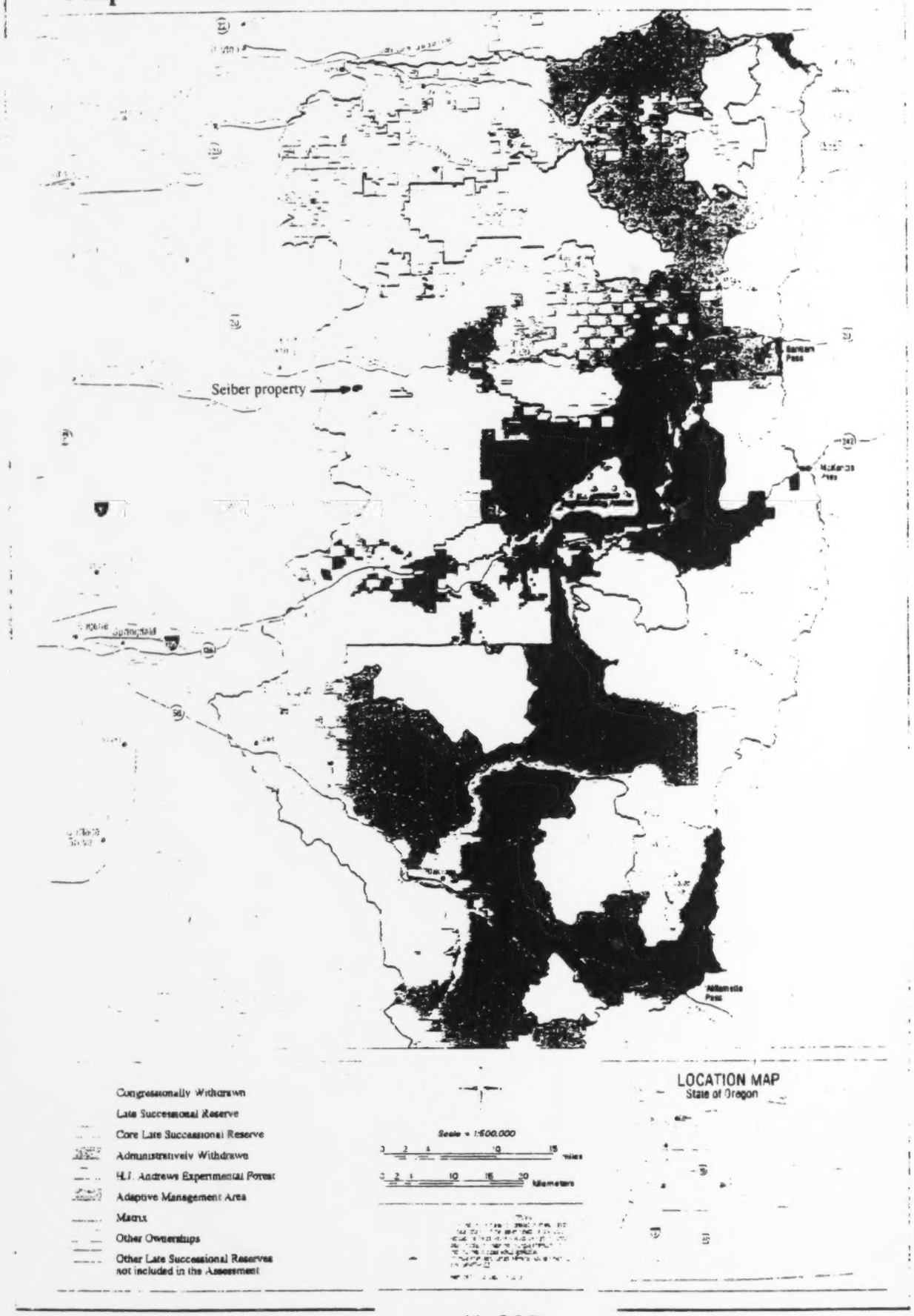
Executed this 6th day of November, 2001.

/s/ Vicki M. Finn
VICKI M. FINN

Map 10 ETC. [fold-in]

USDA Forest Service, USDI Bureau of Land Management, U.S. Fish and Wildlife Service. 1998.
Mid-Willamette Late-Successional Reserve Assessment

Map 10: NORTHWEST FOREST PLAN ALLOCATIONS



BEST AVAILABLE COPY

APPENDIX R

Forest Ecosystem Management:

An Ecological, Economic, and Social Assessment

Report of the Forest Ecosystem Management Assessment Team July1993

[logo]
United States Department of Agriculture Forest Service

[logo]
United States Department of the Interior Fish and Wildlife Service

[logo]
United States Department of Commerce National Oceanic and Atmospheric Administration National Marine Fisheries Service

[logo]
United States Department of the Interior National Park Service

[logo]
United States Department of the Interior Bureau of Land Management

[logo]
Environmental Protection Agency

* * * *

coordination with the appropriate state agencies, tribes, interest groups, and local communities.

To assist in the immediate transition from development of the set of options described through the selection, refinement, and implementation of a preferred option over the next year may require establishment of an interagency working group to continue analysis of the issues raised through the initial planning process described herein, address questions raised by the planning and regulatory agencies as they move toward implementation, expand the selected option into a more detailed plan, and assist in developing concepts of watershed and adaptive management processes.

Relationships to Nonfederal Lands

The majority of species inhabiting late-successional forests in the Pacific Northwest are not restricted to habitat on federal lands. Nonfederal lands are an integral part of any strategy that seeks to address the overall landscape as an ecosystem. Therefore, this interrelationship will require close cooperation between state agencies, tribes, private landowners, and federal agencies. This is particularly important for threatened and endangered species or other at risk species.

Because of the importance of the watershed scale for successful ecosystem management, planning activities for mixed ownership areas should be coordinated with nonfederal agencies or landowners wherever appropriate. Coordination of activities will play an integral part of ecosystem management at the regional, provincial, and watershed scales, regardless of the landowner or manager. The states should be actively involved by taking the lead in developing conservation ecosystem management objectives applicable to nonfederal lands.

Mechanisms for providing incentives to nonfederal landowners should be explored to encourage cooperative and coordinated efforts. Participation of nonfederal interests in planning for ecosystem management can identify opportunities to provide these incentives. A proactive approach to reduce potential conflicts, such as reducing the need for future listings, should be emphasized here. In these types of planning processes, priority should be given to finding ways of gaining maximum benefit from conservation activities to account for multiple species (e.g., the spotted owl, anadromous fish, marbled murrelet).

Partnerships between local, state, and federal parties offer unique opportunities to share information on these practices and to test different management techniques (e.g., Applegate Project in Oregon). These cooperative projects are intended to

integrate the applicable authorities and techniques into a multiorganizational action to address the ecosystem problem.

Administrative, Budget, and Staffing Needs

The interagency approach requires that past methods of operation must be altered. to accommodate a more interactive and up front approach to planning along with opportunities for others (e.g., states, interest groups) to participate. The current budget process may not be compatible with integrated resource management and may require a change in the way budgets are allocated, particularly for the land managing agencies that Regulatory agencies should also change the focus of their involvement from a reactive to a more proactive and cooperative role. This will entail not only a change in the way they carry out their mandates but also a shift in workload from pure regulatory review to a more planning-oriented process, which will result in a heavier involvement in land planning efforts.

The Forest Ecosystem Management Assessment Team .did not examine the potential costs to the federal government of implementation of the options described in this report. However, considerable effort will be needed to carry out the expected planning, monitoring, research, and associated projects that are important to the success of this effort. This includes a recognition that roles and needs for current staff do not disappear, but evolve as we implement new ways of conducting business are implemented.

Pending additional analysis, we emphasize that, regardless of the option selected, it is likely incorrect to conclude that reductions in funding and personnel are possible because of the possibly inaccurate assumption that ecosystem management will be somehow cheaper than management with more emphasis on traditional revenue-generating activities.

Overview: Policy Conclusions

Managing Risk: Recognizing the Implicit Tradeoffs

The Forest Ecosystem Management Assessment Team analyzed the ecological, social, and economic implications of 10 management options for the federal forests in the range of the northern spotted owl. The Team worked to integrate assessments of biophysical processes with assessments of community capacity and economic factors.

This report presents the analysis of the implications of satisfying the biophysical requirements of protecting wildlife and fish species, providing adequate distribution of late successional/old growth forests, and protecting riparian and watershed systems in the context of a social and economic system dependent upon a wide range of forest values and resources. Figure II-34 presents some of our findings in graphic terms.

Figure II-34 demonstrates, by option, the effect on the Probable Sale Quantity of timber on tradeoffs between acres of late-successional forest in the Matrix (open to timber management for commercial purposes) and acres in Reserves. Figure II-35 shows the tradeoffs as they affect the number of species (plants and animals) that the panels of experts rated as 60 percent or more likelihood of having habitat on federal lands capable of supporting a viable population well-distributed in the planning area.

It can be seen in figure II-34 that nearly all the difference in the Probable Sale Quantity expected from each Option is accounted for by the amount of late-successional forest in the Matrix that is subject to timber harvest (R^2—.90). This is not surprising as most of

* * * *

APPENDIX S

STOEL RIVES LLP
ATTORNEYS
Standard Insurance Center
900 SW Fifth Avenue, Suite 2600
Portland, Oregon 97204-1268
Phone (503) 224-3380 Fax (503) 220-2480
TDD (503) 221-1045
Internet wwwstoeLcorn

January 3, 2000

PHILLIP D. CHADSEY
Direct Dial
(503) 294-9376
email pdchadsey@stoel.com

U.S. Fish and Wildlife Service
Ecological Services
Endangered Species Permits
911 NE 11th Avenue
Portland, OR 97232-4181

Re: Incidental Take Permit/Habitat Conservation Plan
Alvin J. Seiber and Marsha E. Seiber

Dear Sir or Madame:

On November 24, 1999 I submitted on behalf of Alvin and Marsha Seiber an Incidental Take Permit application, Habitat Conservation Plan and Implementation Agreement pertaining to the northern spotted owl nest that is allegedly located on the adjacent property owner's land to the north of their property. As yet it does not appear that any notice has been published in the Federal Register.

Please advise me within ten days when such notice will be published, as I would like to avoid having to file a mandamus proceeding.

Very truly yours,

/s/ Phillip D. Chadsey
PHILLIP D. CHADSEY

PDC:kre
cc: Mr. and Mrs. Seiber

APPENDIX T

UNITED STATED DEPARTMENT OF THE INTERIOR

FISH AND WILDLIFE SERVICE
Oregon State Office
2600 S.E. 98th Avenue, Suite 100
Portland, Oregon 97266
(503) 231-6179 FAX: (503) 231-6195

Reply To:
File Name: 8539.40001(00)

January 11, 2000

Phillip D. Chadsey
Steel Rives LLP
Standard Insurance Center
900 SW Fifth Avenue, Suite 2600
Portland, Oregon 97204-1268

Dear Mr. Chadsey:

Thank you for letter January 3, 2000, letter regarding the Alvin and Marsha Seiber incidental take permit application. We are processing the subject incidental take permit in our ordinary course of business and will inform you in the near future of any necessary or pending actions, including expected Federal Register publication dates. We are reviewing whether the habitat conservation plan (HCP) submitted as part of the incidental take permit application-contains the necessary information. We are also reviewing whether the HCP would qualify as being a "low effect". HCP, as suggested by the application. If you have any additional questions, please contact Richard Szlemp of my staff at the above address, by phone at (503) 231-6179.

Sincerely,

/s/ Barry Mulder
BARRY MULDER
Oregon State Supervisor

APPENDIX U

STOEL RIVES LLP
ATTORNEYS
Standard Insurance Center
900 SW Fifth Avenue, Suite 2600
Portland, Oregon 97204-1266
Phone (503) 224-3380 Fax (503) 220-2480
TDD (503) 221-1045
Internet wwwstoeLcorn

February 2, 2000

PHILLIP D. CHADSEY
Direct Dial
(503) 294-9376
email pdchadsey@stoel.com

VIA FACSIMILE &FIRST CLASS MAII,

Ms, Lynn Peterson
Regional Solicitor
United States Department of the Interior
Pacific Northwest Region
500 N. E. Multnomah Street, Suite 607
Portland, OR 97232

Re: Incidental Take Permit
Alvin J. Seiber and Marsha E. Seiber

Dear Ms: Peterson:

Since I personally submitted the Incidental Take Permit ("ITP") for Mr. and Mrs. Seiber to the United States Fish and Wildlife Service ("USF&WS") it has sown from the outset that they are being represented by legal counsel. In view of my prior representation of Boise Cascade Corporation and the involvement of your office in the two cases it brought against the USF&WS, I can only assume that your office was also

aware that the Seibers were represented by legal counsel and that .the USF&WS personnel in dealing with the Seibers were acting in accordance with your advice.

Approximately two weeks ago, I received a telephone call from Richard Szlemp, of the USF&WS. asking if I would arrange for him to inspect the spotted owl core area that the Oregon Department of Forestry had designated on the Seibers' property. I then arranged with Mrs. Seiber for Mr. Szlemp's visit. In doing so, I thought he would act in a professional manner and restrict his questions and comments to the boundaries of the core area and the location of the nest site.

However, Mrs. Seiber sent me a memo stating the following occurred:

> "Notes of meeting on January 25th! 2000 with Rich Szlemp and Keith Swindle, from the Federal Fish & Wildlife
>
> Approximately 11.00 Rich & Keith arrived at our home. Introductions were made & we left to visit the owl corridor 1pated on the north edge of our property. The group included Rich, Keith, myself, Jerry Whaley and Bud Baumgartner, friend and also a long time forester and present president of the Linn County Chapter of the Oregon Small Woodlands Association.
>
> "Rich, Jerry & Bud were walking in front and I was walking next to Keith. As the others moved ahead, Keith tapped me on the shoulder to get my full attention and we stopped. He said to me, 'We don't like Chadsey. We have dealt with him before and I can tell you one thing. The ONLY reason he has flied for this incidental take permit, is because he WANTS us to turn you down, so he can take us to court and DEMAND just compensation. He do this all the time.'

"I told him that was NOT true and CD' the case here, that the reason we had filed it is because we were FORCED to do so and had no choice.

"Then he changed the subject and told me we REALLY need to do an HCI and. a good way to do that would be to hire a college student of forestry and another in the biologist field and have them get together and work up a conservation plan for us. He said that would save us a lot of nosey and we would get a goad report from them. He said these students are very $harp and would not steer us wrong and it' would be best all around.

"He also said that we (Alvin, myself, Jerry or whoever we want) could sit down & discuss what we would like our property to be like in the future which could be anywhere in the next 10 to 50. years, then put that in writing. For instance, that we would agree not-to touch certain areas, that certain things would be done in other areas at specified times, If they then agreed with this plan. it would be signed and would become a contract. If they KNOW we WILL be providing owl habitat elsewhere on our property, then we would be given permission to log the existing core area.

"I told Keith that when we had originally been notified about the presence of the spotted owl I had asked a lot of questions about how the surveys were done.

"After that, we headed back to our road, then walked down to the clear-nut in the center of the core so they could sees the age & condition of our reprod there. As we came back up the road, we were still discussing alternatives.

"They again remarked that if We didn't have an attorney handle this for us it would .not be so expensive, as THAT is where our costs came in (this was AFTER Keith told me we should hire a student biologist and a

forester). They said we would be able to come to a much better solution between us. Throughout the afternoon there were SEVERAL comments to this effect.

"(Jerry later told me that when had walked ahead with Rich, Rich asked him (Jerry) if he knew Chadsey. Jerry told him "Only what the Seibers have told me." Rich told him, 'Well, I will tell you about Chadsey! He has something against the Endangered Species Act, and he goes out and solicits people who have been effected by it and then he goes to court to get compensation for them. We have had dealings with him before.' Jerry said he didn't reply to that as he knew the truth in this case, which is that I made the initial contact with Mr. Chadsey,)

Before they left I again asked what is, the next step. Rich said again that they have to publish this in the public register, because Chadsey says they have to. He said, 'If we have to publish at this time, without a plan (from Alvin & myself) you will not like what is published, but it will be because, we have not had time to come to an agreement with you.'

"At the end of the conversations, we talked a bit about the ways this whole mess has evolved. I then said to them, 'when this core was first set by Rod Kramer & Lee Vaughn and. CTC, we felt we had no choice but to cooperate with the DOF. We thought we HAD to. We were getting very tired of the double talk and about that time I heard about the Boise case and I made it my business .to find out who their attorney was, Then I called him and presented him the facts. I did that because we needed to know what our options were and then we found out what our rights were. I only wish I had done it in the very beginning.

"They had NOTHING to say to this, as I figured they wouldn't.

"As they went to their vehicle, they were still making noises about IF we didn't go through our attorney. . . ."

The attempts of the USF&WS to interfere with. lay relationship with the Seibers is inexcusable. Not only was it unprofessional, but if it. was done with the advice or knowledge of your office it was a serious ethical breach on the part of your staff. You should advise all USF&WS personnel that they are not to discuss the merits of TTP applications and habitat conservation plans with my clients .unless I am present.

You can pass on to your client that there will be no changes in the Seibers' HCP and that if the USF&WS does not publish notice in the federal register by February 15 . 2000, it will be sued.

Very truly yours,

/s/ Phillip D. Chadsey
PHILLIP D. CHADSEY

PDC:kre
cc: Mr. and Mrs. Seiber

APPENDIX V

[LOGO]

UNITED STATES DEPARTMENT OF THE INTERIOR
OFFICE OF THE SOLICITOR
Pacific Northwest Region
500 N.E. Multnomah Street, Suite 607
Portland, Oregon 97232

[Filed Feb 7, 2000]

Phillip D. Chadsey
Stoel Rives
Standard Insurance Center
900 SW Fifth Avenue, Suite 2300
Portland, Oregon 97204-1268

RE: Incidental Take Permit Application of Alvin and Marsha Seiber Dear Mr. Chadsey:

I have reviewed your letter of February 2, 2000. I want to assure you that this office never advised and had no knowledge of the discussions FWS employees reportedly had with your clients during a recent inspection of their property. After reviewing your letter, my staff reiterated for the Fish and Wildlife Service (Service or FWS) employees reviewing your clients' application your request that all communication regarding the application should be directed to you.

Barry Mulder, of the FWS advised you in his letter of January 11, 2000, that the Seibers' permit application is being processed in the ordinary course of business. According to FWS, the application lacks much of the biological analysis and information routinely provided by their other applicants. According to FWS, the application was prepared without any discussion with Service employees. The Service has published a Habitat Conservation Plan (HCP) Handbook which identifies steps incidental take permit applicants may take to

assist the Service in processing an incidental take permit as expeditiously as possible. Those steps do not appear to have been taken with this HCP.

The Service remains willing to work with the Seibers, through you, if there is a desire to discuss modifications to the permit application which may assist the Service in expediting processing the permit. If you would like to discuss this matter, please call Steven Siegel of my staff at (503) 231-6298.

Sincerely,

/s/ Lynn Peterson
LYNN PETERSON
Regional Solicitor

APPENDIX W

STOEL RIVES LLP
ATTORNEYS
Standard Insurance Center
900 SW Fifth Avenue, Suite 2600
Portland, Oregon 97204-1268
Phone (503) 224-3380 Fax (503) 220-2480
TDD (503) 221-1045
Internet wwwstoel.com

February 9, 2000

PHILLIP D. CHADSEY
Direct Dial
(503) 294-9376
email pdchadsey@stoel.com

VIA FACSIMILE & FIRST CLASS MAIL

Ms. Lynn Peterson
Regional Solicitor
United States Department of the Interior
Pacific Northwest Region
500 N.E. Multnomah Street, Suite 607
Portland, OR 97232

Re: Incidental Take Permit Application of
Alvin J. Seiber and Marsha E. Seiber

Dear Ms. Peterson:

Thank you for assuring that your staff has conferred with the U.S. Fish and Wildlife Service ("USF&WS") employees so that they do not engage in the type of conduct described by Mrs. Seiber on future occasions.

I am surprised by your comment that the Seibers' application "lacks much of the biological analysis and information routinely provided by their other applicants." The Habitat

Conservation Plan ("HCP") submitted by the Seibers closely parallels the one submitted by Coast Range Conifers, LLC ("CRC"), which provided the basis for the USF&WS issuing it an Incidental Take Permit ("ITP") for the spotted owl and marbled murrElets habitat several years ago. CRC is another client of mine that has a second ITP pending for bald eagles. The Seibers' HCP also closely parallels an HCP submitted by Boise Cascade Corporation that the USF&WS published notice in she Federal Register concerning its plan without claiming that it lacked information or a sufficient biological analysis. It seems that the USF&WS is engaging in "make weight" arguments not to publish. There is no desire on. the Seibers' part to discuss modifications to the permit application and the process can be expedited by publishing notice in the Federal Register without further delay. If that is not done by February 15, 2000. I intend to file a mandamus action to get the process moving.

Very truly yours,

/s/ Phillip D. Chadsey
PHILLIP D. CHADSEY

PDC:kre
cc: Mr. and Mrs. Seiber

APPENDIX X

[Federal Register: February 18, 2000 (Volume 65, Number 34)]
[Notices]
[Page 8434-8436]
From the Federal Register Online via GPO Access [wais.access.gpo.gov]
[DOCID:frl 8fe00-102]

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

Availability of a Habitat Conservation Plan and Receipt of an Application for an Incidental Take Permit for the Wiley Creek Unit, Linn County, OR

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of receipt of application.

SUMMARY: This notice advises the public that Mr. Alvin and Mrs. Marsha Seiber (applicants) have applied to the Fish and Wildlife Service (Service) for an incidental take permit pursuant to section 10(a)(1)(B) of the Endangered Species Act of 1973, as amended (Act). The application has been assigned permit number TE022715-0. The proposed permit would authorize the incidental take, in the form of habitat modification, of the northern spotted owl (Strix occidentalis caurina), federally listed as threatened. The permit term has not yet been defined by the applicants. The permit would address up to approximately 200 acres, which is the entirety of their property in Linn County, Oregon.

The Service announces the receipt of the applicant's incidental take permit application and the availability of the proposed Wiley Creek Unit Habitat Conservation Plan (Plan)

and draft Implementation Agreement, which accompany the incidental take permit application, for public comment. The Plan describes the proposed project and the measures the applicant will undertake to mitigate for project impacts to the spotted owl. These measures and associated impacts are also described in the background and summary information that follow. The Service is presently reviewing our responsibilities for compliance under the National Environmental Policy Act (NEPA) and will announce the availability of any appropriate NEPA documents at a later date.

DATES: Written comments on the permit application and Plan should be received on or before March 20, 2000.

ADDRESSES: Individuals wishing copies of the permit application or copies of the full text of the Plan, should immediately contact the office and personnel listed below. Documents also will be available for public inspection, by appointment, during normal business hours at the address below. Comments regarding the permit application, Draft Implementation Agreement or the Plan should be addressed to State Supervisor, Fish and Wildlife Service, Oregon State Office, 2600 S.E. 98th Avenue, Suite 100, Portland, Oregon 97266. Please refer to permit number TE022715-0 when submitting comments.

FOR FURTHER INFORMATION CONTACT: Mr. Rich Szlemp, Fish and Wildlife Service, Oregon State Office, telephone (503) 231-6179.

SUPPLEMENTARY INFORMATION: Section 9 of the Act and federal regulation prohibits the "taking" of a species listed as endangered or threatened. However, the Service, under specific circumstances, may issue permits to "incidentally take" listed species, which is take that is incidental to, and not the purpose of, otherwise lawful activities. Regulations governing permits for threatened species are promulgated in 50 CFR 17.32. Regulations governing permits for endangered species are promulgated in 50 CFR 17.22.

Background

The applicants are proposing to harvest approximately 40 acres of mature second growth forest from a 200-

[[Page 8435]]

acre parcel of land which contains a little over 150 acres of forest land. These 40 acres have been delineated by the Oregon Department of Forestry as a portion of an approximately 70-acre spotted owl core area under the Oregon Forest Practices Act (OFPA). The remaining approximately 30 acres are located immediately to the north on adjacent private property. The surrounding ownership primarily consists of private forest lands. There are a few scattered parcels of Federal forest lands within a radius of five miles of the property, with much larger contiguous Federal forest lands (Willamette National Forest) located about seven miles to the northeast. A spotted owl nest tree is located within about 300 feet of the northern portion of the property on adjacent private land. A pair of spotted owls was last documented using this site in 1996. Other federally listed species may also be affected by the proposed Plan. Steelhead salmon (Oncorhynchus mykiss), federally listed as threatened, are found in Little Wiley Creek within the property boundaries. The eastern portion of the harvest area encompasses both sides of Cedar Creek, which is a perennial fish-bearing stream that drains into Little Wiley Creek. No surveys have been conducted for bald eagles (Haliaeeus leucocephalus), which are also federally listed as threatened, but the Plan area does contain potential suitable bald eagle habitat.

The Wiley Creek Plan area contains forests that are generally second growth between 40-65 years old. The predominant species are Douglas-fir, silver fir, and western hemlock, with scattered western red cedar, big-leaf maple, and alder. The percent canopy coverage and relative density of trees varies widely throughout the Plan area. Most of the sur-

rounding land is similar second growth, with many patches of clearcuts that are less than 20 years old.

The Wiley Creek Plan contains two alternatives: preferred and no action. Under the preferred alternative, the applicants would harvest 40 acres of mature second growth timber in the Plan area to the extent allowed by the OFPA rules. Under the no action alternative, the subject timber would be left standing. The applicants rejected the no action alternative because they believe it would deny them of all economically productive use of the subject timber.

The applicants propose the following minimization and mitigation measures:

a. Conduct harvest activities outside of the nesting season for the spotted owl (March 1--September 15), except for road building

b. Replant Douglas-fir, western red cedar, and/or western hemlock over the harvest units. As per OFPA Rules, this planting will take place within 12 months after completion of harvest.

c. Meet current OFPA Rules with regard to management of riparian areas.

d. Meet the current OFPA Rules to leave standing and unharvested, all snags and dead trees until they have fallen to the ground and rotted away except when they provide a safety hazard for the logging operation.

Summary of Service's Concerns and Recommendations

The Wiley Creek Plan was prepared without any technical assistance from the Service. The Service received the Plan and application on November 26, 1999. The Wiley Creek Plan lacks much of the biological analysis and information routinely provided by other applicants or developed by working together with the Service prior to submitting an incidental take permit application. For example, no infor-

mation on the quality of the existing northern spotted owl habitat, current information on northern spotted owl survey efforts, or surrounding landscape was provided in the Plan. Information on the timber harvest or yarding methods was inadequate to determine effects to the listed species and the affected environment. Information on the effect of implementing the proposed minimization or mitigation measures was also lacking. Potential effects to steelhead were also not addressed.

Service employees visited the Plan area on January 25, 2000, to assess existing habitat conditions and to evaluate additional options to minimize and mitigate impacts to spotted owls. However, on February 4, 2000, the applicants' counsel informed the Services that there will be no changes in the Wiley Creek Plan. The applicants' counsel also requested this notice be published prior to February 15, 2000.

The Service has reviewed the Wiley Creek Plan and has some concerns with the adequacy of the minimization and mitigation measures. We specifically invite the public to provide comments on these measures proposed by the applicant. We also invite comment on potential alternative options. The Service believes that other practicable minimization and mitigation measures may exist that would provide the basis for reducing the net long-term adverse effects to owls by allowing for the regeneration of suitable nesting habitat conditions within a shorter time period than would result from the proposed harvest. These alternatives could also provide some increased opportunities for owl foraging and roosting immediately after the timber harvest, which would minimize and mitigate the incidental take of owls. Specifically, the Service wishes to receive comment on options that may include partial harvest of the proposed 40 acres that would provide some level of spotted owl habitat either immediately after harvest or within a given period of time after harvest. Additionally, we seek comments on the

management of the remaining forested acreage on the applicant's property that would provide habitat conditions to mitigate for the loss of the 40 acres of forest proposed for clearcut harvest. Comments on alternatives should include discussion of time periods that would be appropriate to create or maintain spotted owl habitat to mitigate for any potential losses of suitable habitat under any suggested alternative. This information would assist the Service in addressing appropriate permit duration.

The impacts from the applicant's preferred alternative would reduce the likelihood of spotted owls nesting within the boundaries of the 70 acre core area due to the smaller remaining patch of habitat surrounded by recent clearcut timber harvests. The OFPA requires the leaving of two trees per acre with a minimum of 11 inches diameter at breast height per acre harvested. The location and size of actual leave trees has not been specified. Based upon the available size classes and numbers, these trees will not likely provide or contribute to any measurable spotted habitat immediately post-harvest. Except for some potential clumping of trees, and the riparian buffer areas, the remaining landscape would consist of a very open canopy that would not be conducive to owl nesting, roosting, or foraging. The Plan would leave a minimum 70-foot riparian buffer along Cedar Creek and a minimum 50-foot buffer along an unnamed tributary that enters into Cedar Creek. These narrow, treed corridors would not provide suitable forested habitat conditions for spotted owls.

This notice is provided pursuant to section 10(c) of the Act. The Service will evaluate the permit application, Plan, and comments submitted thereon to determine whether the application meets the requirements of section 10(a) of the Act. If it is determined that the requirements are met, a permit will be issued for the incidental take of the northern spotted owl. The final permit decision will not be made prior to ensuring compliance with NEPA.

[[Page 8436]]

Dated: February 10, 2000.

Anne Badgley,
Regional Director, Region 1, Portland, Oregon
[FR Doc. 00-3783 Filed 2-17-00; 8:45 am]
BILLING CODE 4310-55-P

APPENDIX Y

[LOGO]

UNITED STATES DEPARTMENT OF THE INTERIOR

FISH AND WILDLIFE SERVICE
911 N.E. 11th Avenue
Portland, Oregon 97232-4181

[Filed Jul 6, 2000]

In reply refer to:
AES-ES

Mr. Phil Chadsey
Stoel Rives LLP
900 SW Fifth Avenue, Suite 2600
Portland, Oregon 97204-1268

Dear Mr. Chadsey:

This responds to Marsha and Albert Seiber's November 24, 1999, application under section 10(a)(1)(B) of the Endangered Species Act (ESA) and the accompanying Habitat Conservation Plan (HCP) for the Wiley Creek Unit. In that application, the Seibers requested authorization to incidentally take the threatened northern spotted owl (owl) by harvesting 40 acres of forest within their approximately 200-acre property in Linn County, Oregon. I regret to inform you that this application must be denied for the reasons discussed below. However, we are convinced that other approvable alternatives are available for the subject timber harvest, as discussed below.

Before the Fish and Wildlife Service (Service) can issue an incidental take permit, we must make the following findings: (1) the taking will be incidental; (2) the applicant will, to the maximum extent practicable, minimize and mitigate the impacts of such taking; (3) the applicant will ensure that adequate funding for the plan will be provided; (4) the taking will not appreciably reduce the likelihood of the survival and

recovery of the species in the wild; and (5) other measures the Secretary may require as being necessary or appropriate for proposes of the plan will be met (ESA Section 10 (a)(2)(B), 16 U.S.C. section 1539 (a)(2)(B)).

In order to make the finding that the HCP minimizes and mitigates the impacts of take to the maximum extent practicable, the Service first considers the adequacy of the minimization and mitigation program by deter lining if the proposed HCP is based on sound biological rationale and is commensurate with the impacts of take. The Service also considers whether it is the maximum that can be practically implemented by the applicant, typically by reviewing the mitigation programs provided by other applicants in similar situations. In other words, mitigation programs should be based on sound biological rationale; they should also be commensurate with the impacts they address and must be the maximum extent practicable (HCP Handbook, ESA Section 10 (a)(2)(B)(ii)).

The only owl minimization and mitigation measures in the Wiley Creek HCP are to: conduct harvest activities outside of the nesting season for the spotted owl (March 1—September 15) except for road-building; replant the harvest unit with Douglas-fir, western red cedar, and/or western hemlock; maintain riparian buffers as per the Oregon Forest Practices Act rules; and retain all snags and standing dead trees, except when they provide a safety hazard for logging.

Other than the seasonal harvest restriction, no time period is provided for the proposed length of the permit term. However, the Wiley Creek HCP proposes to complete all harvest operations prior to March 1, before the timber can be occupied by another pair of nesting owls. This would have effectively removed any benefits the proposed seasonal restriction could provide. Logging at times other than the owl nesting season may minimize harm to a nesting pair of birds, but does not minimize and mitigate the incidental take

resulting from the removal of the owl nesting habitat. The loss of nesting habitat may lead to the incidental take of territorial owls, owls which are searching for territories, and owls which may seek to use this site in the future.

The Wiley Creek HCP does not contain any minimization or mitigation measures other than what is currently required by the Oregon Forest Practices Act regulations and enforced by the Oregon Department of Forestry. As part of the Service's listing process for the northern spotted owl under the ESA, we reviewed the provisions of the Oregon Forest Practices Act (as well as comparable state statutes in California and Washington) and determined that "clearly no state legislates adequate protection for spotted owls." We also concluded that "existing regulatory mechanisms were insufficient to protect either the northern spotted owl or its habitat." (55 FR 26114). The Wiley Creek HCP's sole reliance on Oregon Forest Practices Act regulations is not a sound biological rationale for minimizing and mitigating the take of the owl.

The proposed harvest would eliminate over one-half of a 70-acre spotted owl core area as defined under the Oregon Forest Practices Act rules. This area represents the best available habitat surrounding a nest site. The proposed harvest would reduce the likelihood that spotted owls would nest within the remainder of the core area due to the proximity of the harvest to the nest site (less than approximately 600 feet), the already fragmented nature of the surrounding forest, and the limited availability of suitable habitat in the area immediately adjacent to the 70-acre core area. Therefore, the likely outcome of the proposed harvest would be the loss of a spotted owl nest site, even though the nest tree itself would not be removed since it is located on an adjacent property. At the very least, 40 acres of suitable spotted owl habitat would be lost indefinitely.

The spotted owls associated with the subject 70-acre core area were originally identified in 1991. In 1992, they exhi-

bited signs of nesting. In 1993 they did not appear to nest. In 1994, they again exhibited signs of nesting. In 1995 and 1996 they were located, but did not appear to nest. They were not located in 1997 or 1998. In 1999, male responses were heard which resulted in the activity center still being considered as active under a generally accepted survey protocol endorsed by the Service and used by the State of Oregon ("Protocol for Surveying Proposed Management Activities that May Impact Northern Spotted Owls," March 17, 1992). The survey results for 2000 are not yet complete. To date, the female of the original pair has been found a few miles to the north of the site with a different male. The original male of the pair is currently unaccounted for pending the results of future surveys. Based upon the survey protocol, the activity center is still considered as active.

If the nest site is abandoned as a result of the proposed harvest, it will no longer serve as an activity center for the production of spotted owl young within the immediate geographic area. Spotted owls display a tendency to reuse an activity center over the years. It is not uncommon for one pair to vacate an activity center only to have another pair occupy the site. While it is difficult to predict where and when spotted owls will choose to nest, once they occupy a site, that site is likely to be used repeatedly. The activity center is a focal point for breeding spotted owls and generally contains nesting, roosting, and foraging opportunities whereas one or more of these types of habitats may not be present in a significant portion of the remainder of the home range of a pair of spotted owls. A pair of spotted owls that was using this site would have to search for a new suitable and unoccupied activity center that did not have a great deal of overlap with other existing owl territories. A pair that settles in an area with other spotted owls pairs would not only have to deal with defending their territory, but also would have to compete for potentially limited food supplies. Searching for a new nest site may preclude a pair from nesting in a given

year. This type of movement could also make the spotted owls more vulnerable to predation by great homed owls or northern goshawks.

In addition to reducing the viability of the owl nest site, the removal of 40 acres of the core area will have a negative impact on spotted owl foraging and roosting opportunities. As previously mentioned, the activity center and core area are not only important in the successful breeding of spotted owls, but provide important foraging habitat. Foraging opportunities will be reduced, which may result in a reduction in the breeding success of the adult birds and also a reduction in a readily available food supply for the developing young, potentially impacting their survival.

The surrounding forested landscape is fragmented and there is not an abundance of alternative foraging habitat within the immediate vicinity of the activity center. Foraging by the adults or any offspring would result in greater exposure to predation by great homed owls and northern goshawks because of the openness of the habitat and the greater distances that would be traveled to find adequate food.

The proposed alternative does not provide any replacement habitat for areas lost through the harvest or provide identifiable suitable spotted owl habitat (nesting, roosting, or foraging) within the harvest area post-harvest. The proposed alternative does not provide any dispersal habitat that would allow owls to successfully migrate through the area in the process of locating mates and suitable nesting sites. The net result is that there is essentially no mitigation being provided for the incidental take of spotted owls associated with the harvest of suitable habitat within close proximity to a nesting location. The incidental take would be either in the form of abandonment of the nest site, thus precluding future breeding, or loss of foraging and roosting opportunities which would decrease the likelihood for spotted owls to survive and successfully reproduce in the area. For these reasons, the

Service has determined that the proposed minimization and mitigation program is not commensurate with the impacts of take.

We have also determined that the proposed minimization and mitigation program in the Wiley Creek HCP is not the maximum extent practicable. In addition to the reasons discussed above, we reviewed two section 10 permits that have been issued to similarly situated landowners. In 1995, the Service issued a 20-year incidental take permit to Regli Estates in Humboldt County, California for 480 acres. In this HCP, suitable owl nesting and roosting habitat was converted into owl foraging and dispersal habitat. The applicant obtained take authorization for two pairs of owls even though adequate habitat was retained for one of the two pairs on the property. In addition to following seasonal harvest restrictions within 500 feet of nesting sites, the Regli Estates HCP provided for partial timber harvest on 320 acres that retained nesting or foraging habitat for owls. Another 50 acres which was grassland at the time of permit issuance, was planted with conifers to increase potential owl habitat in the future. And the remaining acreage was harvested in a manner that retained owl foraging habitat post-harvest.

The Service also issued a section 10 permit to the Scofield Corporation for a 40-acre parcel in Chelan County, approximately 4 miles northwest of Leavenworth, Washington. In this HCP, the owl nest site was located on adjacent Federal lands and the harvest would have resulted in the take of one northern spotted owl pair. Some of the minimization and mitigation measures contained in this HCP were to: (1) conduct selective harvest of 54 percent of the volume of ponderosa pine, Douglas-fir and grand fir which comprises 28 percent of the total number of trees in the project area; (2) retain a no-harvest buffer averaging 300 feet in width between the highway right-of-way and the project area; (3) remove all felled trees with a helicopter; (4) retain all trees 14

inches diameter breast height, and all snags when practicable; (5) time the harvest to preclude disturbance to spotted owls and other wildlife; and (6) place a deed restriction on the project area that prohibits future harvest or tree removal.

To date, the Service has issued 13 section 10 permits that authorize the incidental take permit of northern spotted owls, and is working cooperatively with approximately 20 other landowners to develop HCPs that address northern spotted owls. The two examples above represent just some of the options available to develop an adequate mitigation program. Because minimization and mitigation programs exist that are based on a sound biological rationale, are commensurate with the impacts they address, and are practicable, we have come to the conclusion that the mitigation offered in the Wiley Creek HCP does not meet either the section 10 permit issuance criteria or follow the Service's HCP handbook. Consequently, we have determined that the incidental take permit application for the Wiley Creek Unit must be denied.

In accordance with 50 CFR 13.29, you may request reconsideration of our decision to deny your application. Such a request must be submitted in writing to this office within 45 calendar days of the date of this letter and state the decision for which reconsideration is being requested and the reason(s) for the reconsideration, including presentation of any new information or facts pertinent to the issue(s) raised by the request for reconsideration. Your request for reconsideration must also contain a certification in substantially the same form as that provided by 50 CFR 13.12 (a)(5).

At this time we wish to provide some criteria under which we believe a permit could be issued. Harvest alternatives for the subject 40 acres other than clearcutting, could be pursued. Selective harvest that retains the suitability of the habitat immediately after harvest and is maintained on the landscape for a specified permit term commensurate with the impacts of the harvest may be permitted. Harvest that eliminates the

suitability of the habitat for spotted owls for a period of time after harvest, but results in the regeneration and maintenance of habitat within the permit term may also be considered. Harvest alternatives that include the remainder of the Seiber property in addition to the proposed 40 acres could also be considered. This could involve variations of the harvest proposals discussed above, and also include mitigation and/or harvest options outside of the subject 40 acres. Inclusion of the remaining 160 acres of forested property could increase harvest options on the 40 acres considered in the incidental take permit application. These other forested portions of the property have varying degrees of spotted owl habitat quality. Selective harvest activities can be tailored to enhance available habitat over time, or foster the development of habitat in the future. A permit decision would include analysis of the amount of time anticipated for the enhancement or development of habitat conditions as well as the maintenance of those conditions for a period commensurate with the time that habitat was degraded. Harvest alternatives could also be considered outside of the subject 40 acres but within the Seiber's property, and the retention of the 40 acres could function as a component of the mitigation that offsets the impacts of the harvest in part or in whole.

We believe that the alternatives available to the Seibers are too numerous to outline in great detail here. We also believe that the Seibers should have the latitude to devise alternatives that meet specific management objectives while providing an appropriate level of mitigation for any spotted owl incidental take. We are available to provide technical assistance to the Seibers in developing alternatives and offer our assistance in finding harvest alternatives consistent with the objectives set forth under section 10 of the ESA.

We also want to inform you that the National Marine Fisheries Service has announced its intent to publish a Federal Register notice invoking the section 9 take prohibitions for

steelhead. Listed steelhead are found in Little Wiley Creek. If the proposed action is likely to result in the take of steelhead, the Seibers would need to obtain incidental take authorization from the National Marine Fisheries Service. The Fish and Wildlife Service does not have jurisdictional authority for steelhead or salmon species under the ESA.

If you have any questions, you may refer them to Katherine Hollar of our Portland Regional Office at (503) 231-6241, or Richard Szlemp of our Oregon State Office at (503) 231-6179.

Sincerely,

/s/ Vicki M. Fixin
VICKI M. FIXIN
Acting Assistant Regional Director

APPENDIX Z

STOEL RIVES LLP
ATTORNEYS
Standard Insurance Center
900 SW Fifth Avenue, Suite 2600
Portland, Oregon 97204-1268
Phone (503) 224-3380 Fax (503) 220-2480
TDD (503) 221-1045
Internet wwwstoel.com

July 28, 2000

PHILLIP D. CHADSEY
Direct Dial
(503) 294-9376
email pdchadsey@stoel.com

VIA FACSIMILE AND FIRST CLASS MAIL

Ms. Vicki M. Finn
Acting Assistant Regional Director
U.S. Fish and Wildlife Service
Department of the Interior
911 N.E. 11th Avenue
Portland, OR 97232-4181

Re: Incidental Take Permit/Habitat Conservation Plan
Alvin J. Seiber and Marsha E. Seiber

Dear Ms. Finn:

As legal counsel for Alvin and Marsha Seiber, the undersigned requests reconsideration of the United States Department of Interior, Fish and Wildlife Services' letter of July 6, 2000, which denied the Seibers' application for an Incidental Take Permit ("ITP") for northern spotted owls that may have nested on the adjacent landowner's land in 1994 or prior years.

The reasons for granting reconsideration are:

1. There is no evidence that any owls have used the nesting site since 1994.

2. There is no evidence that harvesting the subject timber would cause "harm" as defined in 50 C.F.R. § 17.3, to any owls in the area. *See United States v. West Coast Forest Resources*, Civ. No. 96-1575-HO (D. Or. March 13, 2000); *Defenders of Wildlife v. Bernal*, 204 F3d 920 (9th Cir 2000).

3. Approval of the ITP appears to be contingent upon exacting mitigation from the Seibers which would constitute a taking of the property for a public use without paying his compensation for a servitude in favor of the government.

I hereby certify that I have read and am familiar with the regulations contained in title 50, part 13, of the Code of Federal Regulations and the other applicable parts in subchapter B of chapter I of title 50, Code of Federal Regulations, and I further certify that the information submitted in this application for a permit is complete and accurate to the best of my knowledge and belief. I understand that any false statement herein may subject me to suspension or revocation of this permit and to the criminal penalties of 18 U.S.C. 1001.

Very truly yours,

/s/ Phillip D. Chadsey
PHILLIP D. CHADSEY

PDC:kre
cc: Mr. and Mrs. Seiber
Ms. Katherine Hollar

APPENDIX AA

STOEL RIVES LLP
ATTORNEYS
Standard Insurance Center
900 SW Fifth Avenue, Suite 2600
Portland, Oregon 97204-1268
Phone (503) 224-3380 Fax (503) 220-2480
TDD (503) 221-1045
Internet wwwstoel.com

September 26, 2000

PHILLIP D. CHADSEY
Direct Dial
(503) 294-9376
email pdchadsey@stoel.com

VIA FACSIMILE AND FIRST CLASS MAIL

Anne Badgley
Regional Director
U.S. Fish and Wildlife Service
Ecological Services
Endangered Species Permits
911 NE 11th Avenue
Portland, OR 97232-4181

Re: Incidental Take Permit/Habitat Conservation Plan
Alvin J. Seiber and Marsha E. Seiber

Dear Ms. Badgley:

On behalf of Alvin and Marsha Seiber we hereby appeal to the Regional Director the denial of an incidental take permit for northern spotted owls that allegedly nested on the land adjoining their property during the 1996 nesting season.

The United States Fish and Wildlife Service (the "USFWS") claims that an owl was in the general area of the

Seibers' property in 1999, but it has failed and refused to produce any evidence to support that claim. Because it has been more than three years since the nesting site was occupied to the USFWS, the site should be declared abandoned.

Further, there is no evidence that logging the Seibers' timber would have any adverse effect on an owl that may have been in the general area of their property in 1999. United States v. West Coast Forest Resources, Civ. No. 96-1575-HO (D. Rp. Mar. 13, 2000).

I hereby certify that I have read and am familiar with the regulations contained in title 50, part 13, of the Code of Federal Regulations and the other applicable parts in sub-chapter B of chapter I of title 50, Code of Federal Regulations, and I further certify that the information submitted in this application for a permit is complete and accurate to the best of my knowledge and belief. I understand that any false statement herein may subject me to suspension or revocation of this permit and to the criminal penalties of 18 U.S.C. 1001.

Very truly yours,

/s/ Phillip D. Chadsey
PHILLIP D. CHADSEY

PDC:kre
cc: Mr. and Mrs. Seiber
Mr. Katherine Hollar

APPENDIX BB

STOEL RIVES LLP
ATTORNEYS
Standard Insurance Center
900 SW Fifth Avenue, Suite 2600
Portland, Oregon 97204-1268
Phone (503) 224-3380 Fax (503) 220-2480
TDD (503) 221-1045
Internet wwwstoel.com

August 7, 2001

PHILLIP D. CHADSEY
Direct Dial
(503) 294-9376
email pdchadsey@stoel.com

VIA FACSIMILE AND FIRST CLASS MAIL

Mr. Pickard Szlemp
U.S. Fish and Wildlife Service
Oregon State Office
2600 S.E. 98th Avenue, Suite 100
Portland, OR 97266

Re: Incidental Take Permit/Habitat Conservation Plan
Alvin J. Seiber and Marsha E. Seiber

Dear Mr. Szlemp:

I have received a copy of a letter from Scott Hayes, Forest Practices Operations Unit Manager for the Oregon Department of Forestry, dated August 3, 2001, which indicates that the State no longer opposes the Seibers harvesting approximately 40 acres of their timber that it had previously designated as being within a northern spotted owl "core area", A copy of that letter was also shown to have been sent to you.

As you are aware, the Seibers prepared a habitat conservation plan and submitted an incidental take permit involving the same timber. At this point, the Seibers need to know whether the US Fish and Wildlife Service still considers the site to be protected and would oppose the Seibers harvesting the subject timber.

Very truly yours,

/s/ Phillip D. Chadsey
PHILLIP D. CHADSEY

PDC:prh
Enclosure
cc: Mr. and Mrs. Seiber
Scott Hayes, Department of Forestry

APPENDIX CC

OREGON
John A. Kitzhaber, M.D. Governor

[LOGO]

Department of Forestry
State Forester's Office
2600 State Street
Salem, OR 97310
(503) 945-7200
FAX (503) 945-7210
TTY (503) 945-7213/800-437-4490
http://www.odf.state.

August 3, 2001

[Logo]
"STEWARDSHIP IN
FORESTRY

Alvin and Marsha Seiber
45277 Wiley Creek Drive
Sweet Home, Oregon 97386-9711

Dear Alvin and Marsha Seiber:

On January 2, 2001, the Department of Forestry sent you a letter which conditionally approved your written plan (notification no. 00-40689), which proposed harvesting approximately 40 acres of timber within a northern spotted owl "core area" previously designated in connection with timber operations on your land. Approval of that written plan was subject to the condition that "commercial harvest operations can commence after March 15, 2001, anytime adequate observations are obtained by the State Forester indicating the Little Wiley northern spotted owl nesting site is not occupied by a pair of spotted owls."

The State Forester has received information that documents that the so-called Little Wiley northern spotted owl nesting site, located near the northern boundary of your property, is

no longer occupied by a pair of owls. The history of the Little Wiley northern spotted owl nesting site includes the following:

2001 No response
2000 Single male
1999 Single male
1998 No response
1997 No response

For the purposes of administering the Forest Practices Act and rules, a northern spotted owl nesting site remains "active" until certain criteria establish that the nest site is no longer occupied by a pair of spotted owls. One of those criteria is if five consecutive years of surveys indicate alternating or varying combinations of unoccupied status and resident single status. Therefore, the Little Wiley northern spotted owl nesting site can be considered to be no longer occupied by a pair of spotted owls, and the protection measures specified in Oregon Administrative Rule (OAR) 629-665-0210 are not required.

If you wish to conduct any type of forest operation, please contact Kevin Crowell, Forest Practices Forester, and submit a completed Notification of Operation. Kevin's telephone number is 503-367-6108.

Compliance with the Forest Practices rules does not guarantee compliance with the federal Endangered Species Act (ESA). Parties conducting operations are subject to all federal requirements as well as any requirements administered under the Forest Practices rules. Parties conducting operations are encouraged to contact the U.S. Fish and Wildlife Service to obtain compliance with the ESA.

Sincerely,

/s/ Rod Krahmer
for Scott Hayes
Forest Practices Operations Unit Manager

cc: Phillip Chadsey, Stonl Rives 112, Attorneys,
Ian Whitlock, Department of Justice
Karen Moynahan, Department of Justice
Kevin Crowell, Linn Diostrict
Richard Szlemo, U.S. Fish and Wildlife Service
Charlie Stone, Department of Forestry
Gregg Cline, Department of Forestry
Rod Krahmer, Department of Forestry
Sandy Middleton, Department of Forestry

APPENDIX DD

UNITED STATED DEPARTMENT OF THE INTERIOR

FISH AND WILDLIFE SERVICE
Oregon State Office
2600 S.E. 98th Avenue, Suite 100
Portland, Oregon 97266
(503) 231-6179 FAX: (503) 231-6195

Reply To: 8539.4001(01)
Oars Number: 01-4165

September 12, 2001

Phillip D. Chadsey
Steel Rives LLP
Standard Insurance Center
900 SW Fifth Avenue, Suite 2600
Portland, Oregon 97204-1268

Dear Mr. Chadsey:

This is in regard to your August 7, 2001, letter inquiring whether the U.S. Fish and Wildlife Service (Service) opposes logging forty acres of land owned by Alvin and Marsha Seiber. A portion of the Little Wiley Creek northern spotted owl core area is located on this land.

Owl surveys have been completed covering the Seibers' property. The surveys follow a Service endorsed survey protocol ("Protocol for Surveying Proposed Management Activities that May Impact Northern Spotted Owls," March 17, 1992). Spotted owl responses are documented on or near the Seibers' property in 1999 and 2000, but not in 2001. Following criteria in the survey protocol, the site would be currently characterized as having "resident single status" at this time, since none of the more recent responses indicated the presence of an owl pair. A site may be considered unoccupied after there are no owl responses for three years.

The documented presence of a northern spotted owl in the vicinity of the Seiber's property in two of the last three years suggests logging the area presents a risk of "take" of the owl.

The Service has not opposed logging proposed by the Seibers. The Seibers' initial permit application, however, did not meet permit issuance criteria found at section 10 of the Endangered Species Act (ESA). Issuance of an incidental take permit provides those acting under permit authority with the assurance that their activities may proceed without risk of violating the prohibitions of section 9 of the ESA. The Service has offered technical assistance in developing an incidental take permit application meeting issuance criteria. Should the Seibers decline to accept the Service's offer and choose to proceed with logging without a section 10 permit, any take which may occur would not be authorized under the ESA.

Sincerely,

/s/ Kemper M. McMaster
KEMPER M. MCMASTER
State Supervisor

APPENDIX EE

STOEL RIVES LLP
ATTORNEYS
Standard Insurance Center
900 SW Fifth Avenue, Suite 2600
Portland, Oregon 97204-1268
Phone (503) 224-3380 Fax (503) 220-2480
TDD (503) 221-1045
Internet wwwstoel.com

September 19, 2000

PHILLIP D. CHADSEY
Direct Dial
(503) 294-9376
email pdchadsey@stoel.com

VIA FACSIMILE AND FIRST CLASS MAIL

Mr. Kemper M. McMaster
State Supervisor
United States Department of the Interior
Fish and Wildlife Service
Oregon State Office
2600 S.E. 98th Avenue, Suite 100
Portland, OR 97266

Re: Incidental Take Permit./Habitat Conservation Plan Alvin J. Seiber and Marsha E. Seiber

Dear Mr. McMaster:

This is in reply to your letter of September 12, 2001. In your letter, you indicate that you have documented spotted owl responses "on or near the Seibers' property in 1999 and 2000." Please provide me with copies of all evidence that you have of spotted owls being "on" the Seibers' property since 1992 through 2000. As I ant sure you are aware, based upon the court's ruling in *United States v West Coast Forest Resources Limited Partnership and Dean's Mt. Logging*, USDC Or Case No. 96-1575HO. Evidence that spotted owls

are in the general area, together with speculation that they may be using the subject property, is not sufficient to satisfy legal requirements of the Endangered Species Act. You can consider this a request pursuant to the Freedom of Information Act for this information.

If the Service does not oppose the logging proposed by the Seibers as indicated by the last paragraph of your letter, please tell us why you did not issue the incidental Take Permit they requested. The Seibers have always been willing to work with the US Fish and Wildlife Service, if it will allow them to log the subject timber. However, they are not willing to agree to conditions that would restrict their right to log the other timber on the property in the future, which is what your representatives suggested to Mrs. Seiber would be necessary in order to obtain a permit. The Service has never indicated how the Seibers' "initial application * * * did not meet the permit issuance criteria found in Section 10 of the Endangered Species Act." If you will tell us how the Seibers can meet that criteria, they are wilting to consider re-submitting their application. However, there is no sense in them submitting another application until they know what the US Fish and Wildlife Service's minimum requirements are concerning the subject timber and their property.

We are well aware of the U.S. Fish and Wildlife Service's strategy to never actually deny an ITP, but through delays force small landowners into accepting unreasonable conditions in order to obtain one. Barton H. Thompson, Jr., "The Endangered Species Act: A Case Study in Takings & Incentives," 49 Stan L Rev 305, 326 (1997).

Very truly yours,

/s/ Phillip D. Chadsey
PHILLIP D. CHADSEY

PDC:kre
cc: Mr and Mrs. Seiber (w/McMaster letter)

APPENDIX FF

UNITED STATES DEPARTMENT OF THE INTERIOR

FISH AND WILDLIFE SERVICE
Oregon Fish and Wildlife Office
2600 S.E. 98th Avenue, Suite 100
Portland, Oregon 97266
(503) 231-6179 FAX: (503) 231-6195

Reply To: 8539.4001(01)
OARS Number: 01-4841

September 28, 2001

Phillip D. Chadsey
Stoel Rives LLP
Standard Insurance Center
900 SW Fifth Avenue, Suite 2600
Portland, Oregon 97204-1268

Dear Mr. Chadsey:

This is in regards to your September 19, 2001 letter, concerning Alvin and Marsha Seiber. As per your request for information about spotted owls on the Seibers' property, enclosed you will find a copy of northern spotted owl surveys conducted in 1992 that indicate spotted owl presence .in the northwest quarter of the northeast quarter of section 8, Township 14 S., Range 2 E, which we understand to be within, property owned by the Seibers. This information was previously provided to you as an attachment to our November 9, 2000 letter regarding the Seibers' incidental take permit application.

Your letter inquired as to why an incidental take permit was not issued to the Seibers. Our letters of July 6, November 9, and September 12, 2000, regarding this matter have specifically addressed these issues. To reiterate briefly, the proposed minimization and mitigation measures were not commensurate with the risk of incidental take, were not the maximum extent practicable, and were not based upon sound biology. Our July 6, 2000 letter provided two examples of

smaller-sized forest landowners who applied for and received incidental take permits for northern spotted owls, and included a brief description of the habitat conservation plans.

Your letter also requested us to specify how the Seibers can meet the permit issuance criteria. We suggested four harvest alternatives to the Seibers in our July 6, 2000 letter. Please refer to that letter for descriptions. We will quickly summarize the four: 1) selective harvest of the 40 acres to maintain spotted owl habitat; 2) harvest that eliminates suitable habitat for a period of time, but with a commitment to regenerate and maintain some level of suitable habitat in the future; 3) harvest alternatives that manage the entire Seiber property as a unit; and, 4) harvest alternatives only outside the 40 identified acres, with the 40 acres serving as mitigation. Many other alternatives exist and we would like to provide technical assistance to help the Seibers decide for themselves which alternative works best for them.

While your letter states that the Seibers have always been willing to work with the U.S. Fish and Wildlife Service, your February 2, 2000 letter did state that there will be no changes to the Seibers' HCP. Nevertheless, our July 6, November 9, and September 12, 2000, letters, -have continued to offer our technical assistance to you and the Seibers to develop an acceptable HCP.

We continue to offer our assistance in revising the HCP and developing an alternative to meet the Seibers' needs as well as the requirements of the Endangered Species Act. If you have any questions, please call Richard Szlemp at (503) 231-6179.

Sincerely,

/s/ Nancy K. Lee
for KEMPER M. MCMASTER
State Supervisor

APPENDIX GG

IN THE CIRCUIT COURT OF THE STATE
OF OREGON FOR THE COUNTY OF LINN

No. 01-0333

MARSHA SEIBER and ALVIN SEIBER,
Plaintiffs,

v.

STATE OF OREGON, by and through
THE OREGON STATE BOARD OF FORESTRY,
Defendant.

FIRST AMENDED COMPLAINT (For Declaratory Relief and Inverse Condemnation Action for a Regulatory Taking of Private Property for a Public Purpose)

CLASS ACTION
Claim not subject to mandatory arbitration

Plaintiffs allege as follows:

INTRODUCTION

1.

Plaintiffs Marsha Seiber and Alvin Seiber (the "Seibers ") are the owners of approximately 200 acres of property (the "Property") located in Linn County, which plaintiff Marsha Seiber acquired through inheritance in 1986. About 185 to 190 acres of the Property are commercial timberlands.

2.

In August 1990, the Oregon State Forester (the "OSF") adopted an interim spotted owl policy precluding timber harvest within a 70-acre core area of the best available suitable habitat in the vicinity of the nest site. The Oregon State Board of Forestry (the "Board") subsequently adopted former OAR 629-024-0809 (present OAR 629-665-0210), which requires protection of a 70-acre core area of suitable northern spotted owl habitat encompassing the nest site. That provision states in part:

> "(1) Whenever the State Forester determines that an operation will conflict with protection of a nesting site of the northern spotted owl (Strix occidentalis .caurina), the operator must obtain the State Forester's approval of a written plan before commencing the operation. The written plan, at a minimum, must address how the operation will be conducted to provide for the following:
>
> "(a) A 70 acre area of suitable spotted owl habitat encompassing the nest site, to be maintained as suitable spotted owl habitat;
>
> "(b) Prevention of disturbances resulting from operation activities which cause owls to flush from the nesting site.
>
> "(2) For the purposes of this rule, nesting site means and includes the tree, when known, containing a spotted owl nest; or when not specifically known, includes an activity center of a pair of adult spotted owls. An activity center is a location determined by the State forester to have been reliably identified as being occupied by an adult pair of spotted owls, capable of .breeding. * * *
>
> * * * * *
>
> "(5) Exceptions to the requirements for protecting northern spotted owl nesting sites may be approved by

the State Forester the operator has obtained an incidental take permit from federal authorities under the federal Endangered Species Act." OAR 629-665-0210.

FACTS GIVING RISE TO PLAINTIFFS' CLAIMS

3.

Timber of the kind found on the Property is considered by defendant to be suitable nesting habitat for spotted owls. In 1994, the OSF informed plaintiffs that a pair of northern spotted owls ("Little Wiley Owls") were nesting in timber on laird immediately to the north of the Property. The OSF then designated approximately 40 acres (the "Subject Timber") of the Property as northern spotted owl nesting habitat pursuant to OAR 629-665-0210 and informed plaintiffs they would not be allowed to log that area, so long as the activity site remained active under Oregon law.

4.

In 1997, plaintiffs were informed by the OSF that the owls bad not nested on the adjacent land during that year. On February 4, 1998, plaintiffs filed Notification No. 98-791-40082 giving notice to the OSF of their desire to log the Subject Timber. In seeking to log the Subject Timber, plaintiffs indicated they were willing to not conduct logging operations while spotted owls might be nesting in the area (March 1 through September) or until the young spotted owls had fledged, to avoid any incidental harm to them. Even though the owls had not nested in the area during 1997, plaintiffs' plan to log the Subject Timber was denied approval on February 19, 1998 on the ground that it failed to describe how the operation would be conducted to provide a 70-acre core area of suitable spotted owl habitat consistent with the requirements of OAR 629-665-0210(1)(a).

5.

Plaintiffs then made a timely appeal of the OSF's denial of their plan to log the Subject Timber to the Board. On or about March 27, 1998, the Board entered a final order that affirmed the denial of plaintiffs' plan. The denial of plaintiffs' written plan by the Board was a final administrative action prohibiting plaintiffs from logging the Subject Timber.

6.

To obtain a waiver of 629-665-0210(1), pursuant to section (5) of that regulation, plaintiffs then submitted an application for an Incidental Take Permit ("ITP") to the U.S. Fish and wildlife Service (tine "USFWS"), after preparing a Habitat Conservation Plan ("HCP") as required by the federal Endangered Species Act ("ESA"). On November 9, 2000, the USFWS issued a Final Order, signed by the Regional Director denying plaintiffs an ITP for the Little Wiley Owls, even though they had not nested in the designated core area that includes the Subject Timber since 1996.

CLASS ALLEGATIONS

7.

By letter dated February 25, 1998 plaintiffs gave defendant notice under ORCP 32 H(1)(b) of intent to bring a class action if the subject regulation was not withdrawn.

8.

In addition to plaintiffs, there are numerous other private property owners in this state who are prevented from logging their timber because it has been included in a spotted owl nesting site pursuant to OAR 629-665-0210. Plaintiffs are typical of other private property owners who have been prevented from logging because their property has been designated northern spotted owl nesting habitat due to the regulation.

9.

Pursuant to ORCP 32, plaintiffs bring this action on behalf of a class consisting of all private property owners who have had their property designated to be included in a 70-acre area for protection as a northern spotted owl nesting site under OAR 629-665-0210 and have not been able to log their timber for that reason.

10.

The class is likely to be so numerous that joinder of all members is unpracticable. Also, because defendant will not disclose the location of northern spotted owl nesting sites except on a need-to-know basis, plaintiffs have no means of ascertaining who all the other property owners are who have had their timber taken for a public purpose as the result of OAR 629-665-0210.

11.

There are questions of law or fact common to the class, and these common questions predominate over any questions affecting individual members.

12.

Plaintiffs' claims are typical of the claims of the class.

13.

Plaintiffs will fairly and adequately protect the interests of the class, and their attorneys are experienced class action counsel.

14.

A class action is superior to other available methods for the fair and efficient adjudication of this controversy.

CLAIM ONE

(Declaratory Relief—Facial Challenge
to OAR 629-665-0210)

15.

Plaintiffs reallege paragraphs 1 through 15 above.

16.

Plaintiffs seek a declaratory judgment pursuant to ORS 28.010, *et seq.*, that OAR 629-665-0210 effects a taking of plaintiffs' property for a public purpose under the Fifth Amendment to the U.S. Constitution. Timber owners who are not permitted to log their timber on account of that rule are required to submit to a physical occupation of that property for use as a spotted owl nesting site; at the same time, they are denied all economic productive use of timber that cannot be logged on account of being preserved as a nesting site. The Board lacks the power of eminent domain authority to obtain a "conservation easement" for the purpose of obtaining property to be maintained as suitable spotted owl habitat; therefore, it did not have the authority to promulgate OAR 629-665-0210 which imposes a wildlife servitude for that purpose. *GTE Northwest, Inc. Public Utility Commission*, 321 Or 458, 900 P2d 495 (1995).

CLAIM TWO
(Oregon Constitution)

17.

Plaintiffs reallege paragraphs 1 through 7 above.

18.

The 40 acres of the Property that plaintiffs have been prohibited from logging contain approximately 800,000 board feet of merchantable timber, and at the time the plan to log the Subject Timber was originally denied in 1998, the timber had a fair market value of approximately $306, 000.

19.

The Board's denial of plaintiffs' plan to log the Subject Timber to preserve it as a spoiled owl nest site and core area habitat constituted a taking of plaintiffs' property for a public purpose, which requires defendant to pay plaintiffs just compensation for the subject timber pursuant to Article 1, section 18, of the Oregon Constitution. On December 1, 2000, plaintiffs through their legal counsel sent the OSF a letter indicating that his enforcement of OAR 629-665-0210 against the Property violates that constitutional provision as amended by the people in the November 2000 election.

20.

The Subject Timber that plaintiffs desire to log has no economic value unless harvested.

21.

The Board's action in denying plaintiffs the right to log the Subject Timber has denied plaintiffs of economically productive use of that property interest.

22.

Plaintiffs are entitled to interest at the rate of 9 percent from March.27, 1998 and their reasonable attorney fees, pursuant to ORS 20.085 and Article I, Section 18 of the Oregon Constitution as amended in 2000.

CLAIM THREE
COUNT ONE

(*Lucas* Per Se Claim—U.S. Constitution)

23

Plaintiffs reallege paragraphs 1 through 7, 19, 21, and 23 and above.

24.

The Board's action in denying plaintiffs the right to log their property deprived plaintiffs of all economically productive use of their merchantable timber and constituted a taking of plaintiffs' property for a public purpose, which requires defendant to pay plaintiffs just compensation for their property under the *Takings* Clause of the Fifth and Fourteenth Amendments to the U.S. Constitution.

CLAIM THREE
COUNT TWO
(*Agins* Claims—U. S. Constitution)

25

Plaintiffs reallege paragraphs 1 through 7, 19 and 23 above.

26.

In 1987 the Oregon legislature enacted a state Endangered Species Act. ORS 496.192(1), which is a part of that act, states that it is was not intended

> "to require an owner of any commercial forestland or other private land to take action to protect a threatened species or endangered species, or to impose additional requirements or restrictions on the use of private land."

27.

That same session of the legislature also adopted ORS 527.630(1), which provides, in part, that "it is declared to be the public policy of the State of Oregon to encourage economically efficient forest practices that ensure the continuous growing and harvesting of forest tree species and the maintenance of forestland for such purposes as the leading use on privately owned land. * * *"

28.

Defendant took no action to adopt what is now OAR 629-665-0210 or otherwise protect northern spotted owl habitat on private lands until the bird was declared a threatened species under the federal ESA in July 1990. OAR 629-665-0120 was adopted as a result of the USFWS adopting guidelines requiring the protection of a minimum of 70 acres of habitat around every northern spotted owl nest site.

29.

However, when the USFWS was required to designate critical habitat for the recovery of the species, it only designated lands owned by the federal government as critical habitat for the northern spotted owl. Farther, the USFWS rescinded its 70-acre guideline as applying to private-property after a federal court found that it had not been adopted according to law.

30.

Because it is the public policy of this state, as stated in ORS 496.192(1) and ORS 527.630(6) above, to not protect threatened species on private commercial forest lands and to encourage their use for sustained yield forestry, OAR 629-665-0210 does not substantially advance a legitimate state interest. Therefore, enforcement of OAR 629-665-0210 constitutes a taking of private property for a public purpose in violation of the 24. Takings Clause of the Fifth Amendment to the U.S. Constitution.

CLAIM THREE
COUNT THREE
(*Penn Central*—U.S. Constitution)

31.

Plaints reallege paragraphs 1 through 7, 19, 23, 27 and 29 above.

32.

Pursuant to Oregon law, plaintiffs acquired and have managed their timberlands with the investment backed expectation that they could use them for the continuous growing and harvesting of forest tree species in order to provide income during their retirement. The application of OAR 629-665-0210 to forty acres of their property prevents them from managing their property in accordance with their investment backed expectations and prevents them from realizing income from the tree crop on those forty acres. Therefore, enforcement of OAR 629-665-0210 constitutes a taking of private property for a public purpose in violation of the Taking Clause of the Fifth Amendment to the U.S. Constitution.

Wherefore, plaintiffs pray that:

A. OAR 629-665-0210 be declared invalid because it takes private property for a public purpose;

B. The Seibers be awarded the sum of $306,00(), together with interest thereon at the rate of 9 percent per annum from March 27, 1998;

C. The court award just compensation to all the other owners of timber who have been prevented from logging it as a result of OAR 629-665-0210 (and former OAR 629-024-0809), in amounts to be' determined at trial; and

D. The court award plaintiffs their reasonable attorney fees and costs. DATED: July 11, 2001.

/s/ _____
Phillip D. Chadsey, OSB No. 66028
Of Attorneys fir Plaintiffs

Trial Attorney: Phillip D. Chadsey

APPENDIX HH

STATE OF OREGON

Ref No. G60096

Mailed by: SLS

Date Mailed: 03/27/98
Case No: 98-GAP-0008
Case Type: DOF

HEARING DECISION

ALVIN & MARSHA SEDER
C/O P LIP D. CHADSEY
900 SW STS AVE STE 2300
PORTLAND OR 97204 1232

DEPARTMENT OF FORESTRY
FOREST PRACTICES-DIVISION
2600 STATE ST
SALEM OR 97310 1336

PHILLIP D. CHADSEY, ATTORNEY
900 SW 5TH AVE STE 2300

PORTLAND OR 97204 1232

RICHARD WHITMAN
ASSISTANT ATTORNEY GENERAL
1162 COURT ST NE
SALEM OR 97310 1320

The following HEARING DECISION was served to the parties at their respective addresses.

BEFORE THE BOARD OF FORESTRY
OF THE STATE OF OREGON

In the Matter of the Denial of a Written plan submitted by ALVIN and MARSHA SEIBER

FINAL ORDER: Notification 98-791-0082

History of the Case: A written plan to conduct a forest operation was submitted to the State Forester, Oregon Department of Forestry, on February 4, 1998. On February 19, 1998, the State Forester, through his authorized 'representative, denied the plan, indicating it was in conflict with OAR 629-665-210(1), because it failed to address how the operation would provide for a 70 acre area of suitable spotted owl habitat The Order further provided that exceptions to the protection of the nesting site may be approved if the operator obtained an incidental take permit from the federal authorities under the Endangered Species Act On February 25, 1998, the landowners, through counsel,

submitted a "Notice of Appeal", setting forth the reason for the appeal. A hearing was to be conducted on March 12, 1998, in Salem Oregon. A Notice of Hearing was mailed setting that date. On March 12, 1998, a pre-hearing conference was conducted with Phil Chadsey, counsel for the landowner, and Richard Whittman and Celeste Doyle of the office of the Attorney German-al A hearing was set for March 23, 1998, at which time parties were informed of their 'opportunity to present evidence and witnesses.

On March 23, 1998, a healing was conducted in Salem, Oregon. The same aforementioned attorneys appeared. Mr. Whitman presented documents and witnesses. Mr. Chadsey failed to present any evidence or witnesses, but did make objections to evidence and question the witnesses presented by the Department of Forestry. The record closed. After that time, the Assistant Attorney General submitted a closing memorandum. It was not considered in the issuance of this final order, as the record had closed, and there had been no indication at the time of the hearing, that the State wished to submit additional briefs.

Legal Issue: Should the written plan submitted February 4, 1998, have been denied under OAR 629-665-210?

Findings of Fact (1) Alvin and Marsha Seiber own 196.19 acres of land located in Section 8, Township 14 South, Range 2, East, W.M., in Linn County, Oregon. (2) The County assessor valued the property at a real market value of $369,570 for the 1997 tax year, with $167,700 attributed to improve rents. (3) The Seibers live on the subject property, in the "improvement", their home, which was built in 1988. There is also an out building and in old bar in disrepair. (4) The property has open range designation, which would allow livestock grazing. (5) The property abutting the subject property is owned by a briber company. (6) In 1990, the federal government listed the Northern Spotted Owl as an endangered and protected species. (7) The timber company

began surveying the property for the Northern Spotted Owl in 1991. (8) In 1991 a pair of Northern Spotted Owls were "banded, and there were over a dozen "responses"-by the owls that aping and summer. (9) In 1992, there were four "responses" from the pair, which had been identified as the Little Wiley pair.

(10) Nesting behavior was observed and the activity center of the pair was located. (11) In 1993, the pair provided fire responses. (12) In 1994, the pair showed sighs of nesting, and the center of activity was moved from the previous location. (13) In 1995, although the pair was sighted, there was no apparent nesting activity. (14) In 1996, fie pair was sighted only once, and again did not exhibit nesting behavior. (15) In 1997, no responses were obtained from the pair. (16) Sightings usually occur in the spring and summer months.

(17) In January, 1996, a Notification of Operation near the Little Wiley nesting site was received by the Oregon Department of Forestry, to log the Seiber's land. (18) The nesting site was located near the land ownership boundary between the Se bens and. the timber company. (19) After reviewing the sighting records, and meeting with the property owners, a 70-acre area of suitable owl habitat was marked. That area had the appropriate characteristics for habitat (20) The US Fish and Wildlife Service had developed guidelines for reducing the risk of harm to the species, by suggesting that at least 70 acres of the best available suitable habitat encompassing the activity center be protected. (21) Critical nesting periods for the species are between March 1, and September 30, of each year. (22) In January, 1996, the department met with both of the .subject landowners, and established a 74-acre area surrounding the activity center, listing that site as a protected resource area. (23) The Seibers owned 41 of the subject acres. (24) The stand contained predominately Douglas fir .and. western hemlock, with lesser amounts of other species. (25) It has an appropriate canopy

closure and sufficient open air space below the canopy, but there are fewer over story trees or snags to be considered optimal for spotted owl habitat (26) Owls in poor habitat nest only once every five years, while optimum conditions allow nesting four out of five years. (27) In 1994, the Seers load four acres. (28) In 1.996 the Seers submitted a Notification of Operation which included a written plan to protect the spotted owl site, which was approved. They harvested 10 acres of the property. (29) On February 4 1998,) Jerry Whaley, submitted a Notification of Operation to conduct a logging operation. September 1, 1998, to log the 41 acres contained in the resource area.

(30) The operation was not allowed to commence until a written plan was submitted addressing both the resource site and the fish bear streams. (31) The plan caned for clear cutting the 41 acres: (32) The Seibers were identified as both the land owners and the timber owners, and there is no evidence that they have entered into any contracts to sell the timber. (32) A "written plan "was submitted, addressing the fish bearing streams. (33) The plan also indicated that, "No operatations (sic) will be conducted during the critical period of use- March 1 to September 1998 or until the young owls fledge whichever date occurs first Because the Saber will not log in the area while the spotted owls are present none of the owls will be harassed, harmed, taken or killed in violation of any state or federal law." (34) On February 19, 1998, the State Forester denied the written plan submitted on February 4, 1998 because it was in conflict with the protection of the Northern spotted Owl nesting site, and does not address how the operation would be conducted to provide for a 70-acre area of suitable spotted owl habitat (35) The Order also provided that 'exceptions to protection el the northern Spotted Owl nesting site may only be approved by the State forester if the operator has obtained an incidental take permit from federal authorities under the federal Endangered Species Act (36) The landowners have not applied for an Incidental take

permit.

(37) If the owls are not found to be in the nesting site for three consee7etive years, .the Department of Forestry will remove no longer carry that site on its "protected resource" site list (38) If the owls are found to be nesting in another area, the Department of Forestry will immediately remove the "proteced resource" classification from the site.

(39) The Seibers have another 85 acres of "forested" property on their parcel (40) On February 25, 1993', the State Forester was sent a notice of appeal from the attorney for Marsha and Alvin Seiber, stating that the Seibers are willing not to have the timber logged during the nesting season, if northern spotted owl are present in the core area this summer, but that once the season is over they want to log the timber within the core area. (41) The letter continued, "They are tired of the State of Oregon using their property as a public 'wildlife reserve to their detriment The Seibers are retired and they need the income from their timber in order to enjoy their retirement As you are aware a unanimous jury in the case of *Boise Cascade Corp. V. State of Oregon*, Clatsop County Circuit Court No. 93-2018, found that the subject regulation requixed timber owners within a 70-acre nesting site to submit to a physical occupation of their property entitling them to just compensation under the Fifth Amendment to the US Constitution, for the loss of use of their timber. *Loretto v. Teleprompter Manhattan CA.TV Corp.*, 458 US 419, 102 5. Ct 31E4, 73 L ED 2nd 868 (1982). "The court also found that the regulation works a taking because a property owner is denied all economic productive use of the timber that cannot be logged. *Lucas v. South Carolina*, 505 US 1003, 112 S Ct 2886 120 L Ed 2nd 798 (1992). Under the rules of issue preclusion (collateral estopple), those findings by the court and jury will be binding in any future litigation brought by property owners against the State seeking compensation on account o: being barred from logging because of OAR 629-

665-0210. *State Farm Fire & Cas v. Reuter*, 299 Or 155, 158-59, 700 P2d 236 (1985). A regulation that works a taking under the Fifth Amendment is also void and unenforceable under Oregon law. *GTE Northwest Inc. v. Public Utility Commission*, 3211 Or 4558, 900 P2d 495 (1995). The Oregon Department of Forestry should consider this letter to be notice under ORCP 32(H(1)(b) as a demand that the Board of Forestry. withdraw the foregoing regulation within the next 30 days. If it does not, my clients waive any hearing before the BOF and request that it issue a final order in this matter as soon as possible."

(42) Mr. Chadsey was sent a Notice of Hearing with a Notice of Conte .d Case Rights and Procedures, and by letter dated March 6, 1998, he indicated that he was waling to waive a right to a heaving so that a final order could be entered. -by the Board at the next meeting (43) On March 11, 1998, Mr Chadsey wrote to the Assistant Attorney General indicating that his diems admit that they have not complied with the requirements of the administrative rule by fading to address how the 70-acre core area will be protected. He suggested it would be a waste of time to hold a hearing, and argued that only a court has the authority to hear the Seiber's federal constitutional takings claims. He further stated that it would violate their right to due process to have the Board of Forestry consider whether its own conduct in a prior proceeding, which both a court and jury have found to have been unconstitutional, is binding upon it in this proceeding based on The ex parte legal advice form counsel that is also representing the Department of Forestry. *Morgan v. United States*, 304 US 1, 58 S Ct 773, 82 L Ed 1129(1938). (44) On March 11, 1998, he was serif documents which would be offered by the Attorney General's office at the hearing, - (45) On March 13, 1998, the Board of Forestry delegated the authority to issue a final order to the Administrative Law Judge in this case.

DISCUSSION

Jurisdiction

Counsel for the landowners makes a variety of arguments, in an apparent attempt to avoid the takings issue being resolved by the Board, or this Administrative Law Judge. First, there was argument that because this administrative law judge (ALJ) presided over one of the Boise Cascade administrative hearings, she is somehow prejudiced in this case. Mr. Chadsey argues that the ALJ was reversed, and this would somehow bias her. He was offered an opportunity to provide any specific evidence of bias. Furthermore, he has failed to demonstrate how a decision in a previous case, which involved a different Landowner, and which did not address the issue of whether a taking had occurred. In face, both the Court of Appeals and the Oregon Supreme Court affirmed the Board determinations issued in Boise Cascade. *See Boise Cascade Corporation v. Board of Forestry*, 325 Or 203, ___ P2d___ (1997). Because he has failed to demonstrate any bias on the part of the fact finder, his objections are without merit.

Mr. Chadsey argues that the issue of a taking has not been raised, and is not properly before this tribunal. His argument is not consistent with his prior pleadings. He requested a hearing specifically alleging that there was issue preclusion preventing the Department from asserting that there was no taking. In that request for hearing, Mr. Chadsey placed the constitutional issues squarely in this forum. He cannot now characterize his request for appeal as anything other than what it is, a direct challenge on the validity of the regulation His challenge clearly is on a constitutional basis, based on both the cases he cited, anti .the clear meaning of his words. Based oz; the arguments presented by Mr. Chadsey, both the state and. federal constitutional challenges have been proffered. OAR 629-55410 which provides for the procedure in requesting a hearing from a denial of a written plan

provides that the request for hearing must include a "specific statement as to the reasons for disputing the State Forester's order, including but not limited to disagreement with any findings leading to the order. In addition, the request for hearing shall state what relief from the order is sought". In this case, Mr. Chadsey apparently sought rescission of the administrative ride: He argues that the rule causes an unconstitutional taking, and implies that it mist therefore be withdrawn. The issue is ripe for adjudication.

Counsel also argues that this forum has no jurisdiction to consider the federal takings issues on two grounds. Firstly, he contends. that the circuit court cast' precludes the Department from asserting that the rule is constitutional It must be noted that although this-argument was 'raised, neither party to this proceeding provided any evidence of the findings made, or the final results reached in the Boise Cascade case. A Circuit Court determination is not a decision of record. Additionally, it cannot be assumed that the interpretation given by any attorney is necessary shared by others the burden is on the party asserting collateral estoppel to prove the elements. The correct procedure would be to place into evidence the prior judgment and the appropriate portions of the record. *See Koos V. Roth*, 43 Or App 353, 602 P2d 1128 (1979) Without such evidence, the arguments averred by counsel about collateral estoppel are unsupported.

However, even if there was evidence of the trial court ruling, it would not necessarily preclude this adjudication. A rule can be found to be invalid as it is applied to a particular set of circumstances, while generally a valid exercise of the state's police power. In *United States v. Mendoza*, 464 US 154, 104 S Ct 568 (1984) the United States Supreme Court did not allow collateral estoppel to be applied against the federal government where a Filipino national-had been denied the right naturalization. In that case, the petitioner had argued that others under simular circumstances had been

granted naturalization by the U.S. District Court upon a finding that the Government had not provided sufficient justification for failing to station an INS representative in the Philippines during all of the relevant periods. The Court discussed, in length he difference between suits involving the government and those between :private parties, aid held that at least in the federal context, nonmutual offensive collateral at estoppel simply does not apply against the Governrnent in such a way as to preclude relitigation of issues. In *Norgard v. Rawlinson* 30 Or App 999, 569 P2d 49 (1977). the Court of Appeals refused to allow this "offensive collateral estoppel" by a non-party to the first proceeding, by explaining that the "existence of over 30 circuit courts in this state made it a practical impossibility for the [Worker's Compensation] Board to be bound by any particular decision of a circuit court" The analysis in Norgard is applicable here. Any determination by a circuit court about whether there was a taking would clearly be fact specific. It cannot be applied to another case, involving another property or other parties. Issue preclusion is not applicable in this case.

Counsel then argues that this forum has no jurisdiction to address the takings issue. In *Boise Cascade*, 325 Or 185, ___P2d ___ (1997), the landowners had been denied a written plan because of its failure to address the northern spotted owl resource site on the property. At the two separate administrative hearings related to separate parcels, the landowner had raised the issue of whether there had been a taking, under both state and federal constitutional law. The Board of Forestry rejected the argument stating that the landowner failed to present evidence of any tag at the one hearing. At the second hearing, the issue of a "taking" was deferred. Subsequently, the landowner filed an Inverse condemnation action in Clatsop County Circuit Court, alleging a "taking under both the Oregon Constitution and the United Stags Constitution. The State moved for dismissal of those actions, and the matter came to the Oregon Supreme

Court on the issue of whether the case should have been dismissed for lack of jurisdiction The State had argued that the Board of Fore y had primary jurisdiction to make a determination in the matter. The Oregon Supreme Court held that the circuit court was not precluded from exercising jurisdiction. However, in its companion case, at 325 Or 203, the Court conducted that the Board has jurisdiction to make a determination as to whether a "taking" had been effected. The Board and the Circuit Court have concurrent jurisdiction to decide "takings" issues.

In *Dodd v. Hood River County*, ___F3d___;1998 WL 57497 (9th Circuit 1998), the Ninth Circuit Court of Appeals addressed zoning regulations and the "takings " clause In that case, the Dodd's purchased forest land property with the hope to build a homesite. At the time, state law limited whether a dwelling could be placed on the property, but the county ordinances were not in compatible with the state law, and. might have allowed development at that time. After the property was purchased, the county passed ordinances to comply with the statewide goals. Several years later the landowners applied for permits to build a residence on the property. If was denied, and the Dodd's appealed to the Land Use Board of Appeals (LUBA), arguing a taking under only the Oregon Constitution. They specifically reserved their takings claim under the federal Constitution. LUBA concluded that there was no taking under the Oregon Constitution because the land could "produce a net profit if properly managed, and therefore, the Dodds were not denied a "substantial beneficial use of the property." That determination was affirmed by the Court of Appeals and the Oregon Supreme Court. The Dodd's then filed suit in federal court The State argued that the issue of whether there was a substantial beneficial use of the property had been previously litigated, and could not be relitigated in the federal forum. The Ninth Circuit concluded that the Dodds had a full and fair opportunity to present all relevant evidence at the first

hearing, and their failure to avail themselves of that opportunity should not allow them to have a "second bite at the apple." The analysis used in the Oregon forums was the same as used in U.S. Supreme Court cases, under *Lucas v. South Carolina Coastal Council*, 505 US 1003, 112 S Ct. 2886 (1992).

Implicit in the discussion in Dodd is the proposition that a state agency has the authority to rule on federal constitutional questions. Clearly, an agency has the authority to invalidate one of its own rules on Constitutional grounds. That is precisely the remedy sought by these landowners. Both the Oregon Courts and the Ninth Circuit agree with that proposition. The Board has the authority to rule on both state and federal constitutional issues, including the issue of whether there has been a taking.

Finally, there is an assertion that under *Morgan v. United States*, 304 U.S. 1, 58 S. Ct 773 (1938), there is some failure of due process in having the Board of Forestry issue a determination in this case. In Morgan the Secretary Agriculture fixed maximum rates to be charged by market agencies at the Kansas City Stockyards. Challenges to the Departments authority were made. The Secretary of Agriculture had singed findings made by the Bureau of Animal Industry after a hearing had been coed acted. Exhibits were received and oral evidence and argument heard. The appellants bad requested an opportunity to submit exceptions and argument to the Secretary, but the request was refused. The Court stated that the right to a hearing embraces not only the right to present evidence, but also a reasonable opportunity to know the claims of the opposing party and to meet them. No such opportunity had been provided to the appellants in Morgan, as the government had failed to present sufficient information as to position to allow for a reasoned response.

Morgan has no application here. Counsel for the landowners asked for an opportunity to see the Department of Forestry's legal arguments prior to the hearing. Arrangement were made to accommodate this. At the hearing, they were given the opportunity to submit additional briefing on any issues raised at that time. Despite these opportunities, the landowners opted not to submit further argument, or to even provide any evidence. The performance of a quasi-judicial function by an administrative agency is of the, highest importance, and does not cripple or embarrass the exercise of its authority. It is in the agency's own interest to ensure a full and fair hearing. That has been done in this case The landowner's refusal to avail themselves of the opportunity does, not make an otherwise fair process unfair.

Application of Rules

ORS 527.710 requires that the Board of Forestry adopt rules establishing forest practice standards throughout the state, assuring the continuous growing and harvesting of forest tree species, and providing for the overall maintenance of fish and wildlife. The statute also requires the board to establish inventories of resource sites needing protection, including species listed under the Endangered Species Act of 1973, as amended and, sensitive bird nesting sites. The board is required to adopt rules appropriate to protecting the resource sites in the inventories.

Pursuant to the legislative mandate, the Board of Forestry has adopted administrative rules. OAR 629-605-0150 requires an operator, landowner or timber owner to notify the State Forester at least 15 days before commencing an operation. OAR 629-605-x070 requires that the operator, landowner or timber owner submit a written plan prior to conducting an operation if the operation is within 100 feet of fish-bearing stream, or within 300 feet of any nesting or

roosting site of a threatened or endangered species. OAR 629-605-0180(1)(c) provides:

> If planned forest practices are determined to conflict with protection of the sensitive resource site, the written plan shall describe reasonable measures sufficient to resolve the conflict in favor of the resource site. Reasonable measures to resolve the conflict in favor of the resource site may include but are not limited to preparing and implementing a habitat management plan, limiting the timing of forest practices, redesigning the proposed practices in favor of site protection and excluding the forest activities outright.

OAR 629-663-0210 provides, in part

(1) Whenever the State Forester determines that an operation will conflict with protection of a nesting site of the northern spotted owl, the operator must obtain the State Forester's approval of a written plan before commencing the operation. The written plan, at a minimum, must address how the operation will be conducted to provide for the following:

(a) A 70 acne area of suitable spotted owl habitat encompassing the next site, to be maintained as suitable spotted owl habitat

(b) Prevention of disturbances resulting from operation activities which cause owls to flush from the nesting site. Such disturbances must be prevented during the critical period of use for nesting. The critical period of use is the time period between March 1, and September 30, each year.

(2) For purposes of this rule, nesting site means and includes the tree, when known, containing a spotted

owl nests, or when not specifically known, includes an activity center of a pair of adult spotted owls. An activity center is a location determined by the State Forester to have been reliably identified as being occupied by art adult pair of spotted owls, capable of breeding. Such determination must be supported by repeated observation of the owls in close proximity or observation of nesting behavior.

(3)(a) For purposes of this rule, suitable spotted owl habitat means and includes.

(A) A stand of trees with moderate to high canopy closure (60 to 80%); a multi-layered, multi-species canopy dominated by large overstory trees; a high incidence of large trees with various deformities; numerous large snags; large accumulations of fallen trees and other woody debris on the ground; and sufficient open space below the canopy for owls to fly; or

(B) In the absence of habitat which exhibits all the Characteristics listed above, the available forested habitat which comes closest to approximately the listed conditions.

(b) Stands which do not exhibit at least two of the characteristics listed paragraph (a)(A) of this section are not suitable habitat.

(5) Exceptions to the requirements. for protecting northern spotted owl nesting sites may be approved by the state. Forester if the operator has obtained an incidental take permit from the federal authorities under the federal Endangered Species Act

The Seibers submitted a notification to operate in an area which had been determined to be a protected resource because of the northern spotted owl pair sighted in that area

since the beginning of surveying for such species. The area designated as the resource site exhibits at least two of the characteristics listed in the administrative rule. The landowners filed to provide for any protection of the resource site, except they agreed not to log the, area during the-nesting season. They do not contest the accuracy of the characterization of the site. the State has presented evidence to support the finding that there have been northern spotted owls nesting on the site, and that the designated 70 acre area is appropriate for protecting the resource. The landowners have failed to seek an exception under the administrative rule. Clearly, the agency acted appropriate tender its own rules in denying the written plan.

Taking - Federal

The Fifth Amendment of the Constitution of the United States provides that "No person shall-be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation"

Counsel for the landowners in this case have failed to make any bona fide effort to present evidence as to whether there has been a taking whether the alleged taking is one of real or personal property; whether this "taking" would be one which is considered a "physical invasion"; or whether it is their contention that the is no value to the land with the regulation imposed by the State.

In fact: they have refused to avail themselves of any of the opportunities for a fair hearing on those issues because they argue that the Board lacks the authority to rule on the issues. As has been discussed above, the Board has authority to address the issues, and they have been fully raised in this forum.

It would appear that the "strategy" of the landowner is to prevent a full and fain inquiry at this level, so there would not be a foreclosure of some future right to litigate.

However, having raised issue, and given the *opportunity* to present both testimony and legal argument the landowner is entitled to a determination as to whether there has been a taking. The landowner has requested an appeal of the denial of the written plan. If they did not wish to have a hearing, they could have allowed the denial, to stand with appealing it, or they could have withdrawn the appeal. They did neither because to do either would have been a failure to exhaust administrative remedies, and probably bar further actions in other forums.

In the Notice of Appeal, the landowners cited two U.S. Supreme Court cases, *Loretto* and *Lucas*, both cited above. *Loretto* related to a permanent physical occupation of property, and the Court held that even a small permanent occupation was a per se "taking", and required just compensation. In *Lucas* the Court held that where the State seeks to sustain regulation that deprives land of all economically beneficial use, it must pay just compensation. "While property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking". Citing *Pennsylvania Coal Co., V. Mahon* 264 US. 393, 43 S Ct. 158 (1922). In *Lucas*, the Court held that the Fifth Amendment is violated when land-use regulation does not substantially advance legitimate state interests, or denies an owner economically viable use of his land In that case, a landowner who had purchased two parcels of beach rout property was denied any right to erect a habitable structure on the property, when the land use laws changed to prohibit branding on land so close to the beach "erosion zone". The estate trial court found that this prohibition rendered the parcels "valueless".

Clearly, the case at hand is not in the nature of a physical occupation of the property. The State has no interest in having use of the property. They simply wish to limit the uses of the 41 awes so long as there is evidence of northern spotted owls using the area for nesting. The government effects a physical taking only where it requires the landowner to submit to physical occupation of his land. *Yee v. City of Escondido, Cal*, 503 US. 519, 112 S. Ct 1522 (1992). As a factual matter, this landowner loses neither the right to possess nor to convey the affected areas. They are permitted to use the property in any way which does not disturb the owl's habitat, and that limitation will only continue so long as the pair remain in that area. In fact under these circumstances, the limitation could be lifted within months, if the owls are found to have created a new resource site through nesting activities. It could be lifted within a year, if the are no sightings of the pair during this critical period, and the next. It could be lifted if the landowners were to obtain an incidental taking permit from the federal government

The U.S. Supreme Court has consistently held that the unit of property for purposes of determining whether a taking has occurred is the owner's full bundle of property rights. *See Penn Central Transp. Co. V. New York City*, 438 U.S. 104, 98 S. CL 2646 (1978). In that case, the Court said that "the submission that appellants may establish a "taking" simply by showing that they have been denied the ability to exploit a property interest that they heretofore had believed was available far development is quite simply untenable. . . . "taking" jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entry abrogated.'

The Sellers own 196 ass of ,land in one tax-lot That property contains other areas which can be harvested for timber, some buildings, including a homesite with substantial value. The fact that the denial of the written plan prevents the

Seibers from pursuing one use of the property for a temporary, but indefinite, period of time, does not mean that it constitutes a taking. The entire property is to be considered. *See MacLeod v. County of Santa Clara*, 749 F.2d 541 (9th Cir. 1984). In *Goldblatt v. Town of Hempstead*, 369 U.S. 590, 82 S. Ct 987 (1962), a city ordinance prevented a landowner from excavating 20 of his 38 acre lot. The Court took into consideration the availability of the remaining 18 acres of land in determining that the ordinance did pot constitute a taking. The landowners retain the right to enjoy the property, as well as any appreciation which might occur, to sell the timber rights, subject to the state and federal protections, to continue to hold this property as an investment, and to use the property for a variety of otherwise acceptable purposes. There was no evidence presented that the property has been made "valueless", by this denial, as required in *Lucas*. In fact, the Landowners refused to provide any evidence whatsoever, and objected to the admission of evidence related to the property as irrelevant Because of this, it cannot be contended that they have raised an argument that there has been any diminution of value [although diminution of value, standing alone, cannot .establish a taking. *See Penn Central*, supra, and *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 47 S. Ct 114 (1926)]

In *Florida Game and Fish Com'n v. Flotilla*, 636 So.2d 761, (Pla. App. 2, Dist 1994), a developer brought a per se Loretto claim when a Florida state regulation prohibited further development within 750 feet of a bald eagle nesting tree The Court found no physical occupation and no taking. In that case, the landowner held 173 acres, and had been developing it in phases. A trial court found that 48 acres had been "taken" for habitat preserve. The apellate court reversed this, Ending no taking simply because those 48 acres were subject to regulation. The property as a whole retained an economic life. The trial court had found that the Commission had "empowered the eagles to decide which land would be taken". The court held that the government neither owns nor

controls the migration of the wildlife species it protects. Rather, the government merely employs it police power to "conserve and protect these species as a natural resource". Unwanted occupation of wildlife on private land may diminish the value of the property, but does not constitute a "taking". *See Christy v. Hodel*, 857 F.2d 1324

The landowner has failed to show that under any federal analysis the denial of the written plan was a "taking".

Taking - State

The Oregon Constitution, Article I, Section 18 provides "Private property shall not be taken for public use, nor the particular services of any man be demanded, without just compensation; nor except in the case of the state, without such compensation first and tendered."

Government action may result in a "taking" under the Oregon Constitution when the governmental action creates an expectation that the private land in question will eventually be taken for public use *See Fifth Avenue Corp. v. Washington Co.*, 282 Or 591, 581 P2d 50 (1978). The property owner, udder such circumstances must show that the landowner is precluded from "all economically feasible private uses pending the eventual taking for public use; or that the designation resulting in such an intrusion as to inflict virtually irreversible damage. This test is not applicable here. There is no "expectation" that the State will take the property, either the land or the limber, for its own use.

A second type of "taking" occurs when the government action deprives the owner of an substantial beneficial or economically viable use of the property. *Lardy v. Washington County*,122,Or App 361, 857 P2d 885, rev den 318 Or 246 (1993). No particular denial of an application for a use demonstrates the loss of all economic use. The fact that one use is impermissible under a regulation does not necessarily mean that other economically productive uses are also

precluded. Additionally, until alternative uses are applied for or attempted, there can be no conclusive authoritative determination of what is legally permitted by the regulations. The Seiber's vehement refusal to apply for an incidental take permit, or to consider other uses of the land makes their claim of a "taking" fail.

There is no evidence as to what the landowners intended to do with the property, or when or how they acquired it. However, assuming that it was originally intended as an investment, it would be inappropriate to find taking. Investments are made with the knowledge of governmental power to make laws for its conduct, and the balancing of regulatory goals against their economic consequences is the daily stuff of politics rather than of litigation for "just.compensation". *See Suess Builders, v. City Beaverton*, 294 Or 254, 656 P2d 306 (1982).

In *Dodd v. Hood River, County*, 317 Or 172, 855 P2d 608 (1993), the Oregon Supreme Court applied the test as set out in *Lucas* supra. The court applies a standard equivalent to Lucas, in that it looked at, whether the landowner had `son le substantial beneficial use of the property'. *See* also, *Dolan v. City of Tigard*, 317 Or 110, 854 P2d 437 (1993). As discussed above, the entire bundle would have to be considered. In this case, the landowner has failed to show that there is no remaining value to the 196 acre parcel. In fact, the evidence shows that there is considerable value as a homesite, and for other purposes.

At the hearing, counsel for the landowner indicated that he believed *Dunn v. City of Redmond* 303 Or 201, 735 P2d 609(1987) precludes the Board from acting in this case. In Dunn had claimed that city ordinances were invalid under both the Oregon and U.S. Constitutions Mr. Dunn challenged the Land Use Board of Appeals determination.

The issue before the court was LUBA's jurisdiction. Under the enabling statutes the board had the authority to reverse or

remand land use decisions if it finds that a local government made an unconstitutional decision. The court held, that under the statutory scheme an individual could challenge the constitutionality of a land use decision to LUBA if the goal were to have the ruling set aside. , If the individual wished for compensation for the government's acts, jurisdiction would belong in Circuit Court. The Board of Forestry has no similar limitations on its authority. The Court found in *Boise*, supra, that the Board does have jurisdiction over such issues. The landowner's argument about the applicability of Dunn is without merit.

FINAL ORDER

The denial of the Seibers written plan was appropriate under OAT: 629-665-0210. Application of the rule does not cause a taking under either the U.S. or the Oregon Constitutions.

/s/ Wendy Lewis
WENDY LEWIS
Administrative Law judge

Dated this 28, day of March 1998

NOTICE: You are entitled to judicial review of this Final Order. Judicial review is by the Oregon Court of Appeals pursuant to the provisions of ORS 183.482. Judicial review may be obtained by filing a petition for review with the Office of the State Court Administrator, Supreme Court Building, Salem, Oregon 97310, within 60 days from the service of the final order.

In the event the Final Order is appealed to the Oregon Court of Appeals, a copy of the petition should be mailed to Hearings Section, Employment Department 875 Union Sit NE, Salem, Oregon 97311, as a means of .expediting the preparation of the record.

APPENDIX II

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF LINN

[Filed Dec 17, 1999]

No. 980649

MARSHA SEIBER, ALVIN SEIBER, and the
OREGON SMALL WOODLANDS ASSOCIATION,
Plaintiffs,

v.

STATE OF OREGON, by and through
THE OREGON STATE BOARD OF FORESTRY,
Defendant.

ORDER AND JUDGMENT

Based upon the Opinion and Order dated November 10, 1999 by the Court of Appeals in the *Boise Cascade Corporation v. State of Oregon*, Case No. CA A100855, the above-entitled action is hereby dismissed, as to the plaintiffs Marsha and Alvin Seiber, without prejudice, on the basis that plaintiffs' "Takings" claims are not ripe for adjudication until the Seibers apply for an Incidental Take Permit from the U.S. Fish & Wildlife Service.

It is further ordered that this action as co the plaintiff Oregon Small Woodlands Association is hereby dismissed with prejudice.

DATED this 17th day of December, 1999.

/s/ Daniel R. Murphy
HONORABLE DANIEL R. MURPHY
Circuit Court Judge

SUBMITTED BY:
Phillip D. Chadsey, OSB No. 66028
Of Attorneys for Plaintiff •

APPENDIX JJ

OREGON ADMINISTRATIVE RULES COMPILATION
CHAPTER 629. DEPARTMENT OF FORESTRY
EMERGENCY FIRE COST COMMITTEE
DIVISION 665. SPECIFIED RESOURCE SITE PROTECTION RULES
Current through August 15, 2000

629-665-0210

Interim Requirements for Northern Spotted Owl Nesting Sites

(1) Whenever the State Forester determines that an operation will conflict with protection of a nesting site of the northern spotted owl (Strix occidentalis caurina), the operator must obtain the State Forester's approval of a written plan before commencing the operation. The written plan, at a minimum, must address how the operation will be conducted to provide for the following:

(a) A 70 acre area of suitable spotted owl habitat encompassing the nest site, to be maintained as suitable spotted owl habitat;

(b) Prevention of disturbances resulting from operation activities which caused owls to flush from the nesting site. Such disturbances must be prevented during the critical period of use for nesting. The critical period of use is the time period between March 1 and September 30, each year.

(2) For the purpose of this rule, nesting site means and includes the tree, when known, containing a spotted owl nest; or when not specifically known, includes an activity center of a pair of adult spotted owls. An activity center is a location determined by the State forester to have been reliably identified as being occupied by an adult pair of spotted owls, capable of breeding. Such determination must be supported

by repeated observation of the owls in close proximity or observation of nesting behavior.

(3)(a) For the purposes of this rule, suitable spotted owl habitat means and includes:

(A) A stand of trees with moderate to high canopy closure (60 to 80%); a multi-layered, multi-species canopy, dominated by large overstory trees (greater than 30 inches in diameter at breast height); a high incidence of large trees with various deformities (e.g., large cavities, broken tops, and other evidence of decadence); numerous large snags; large accumulations of fallen trees and other woody debris on the ground; and sufficient open space below the canopy for owls to fly; or

(B) In the absence of habitat which exhibits all the characteristics listed above, the available forested habitat which comes closest to approximating the listed conditions.

(b) Stands which do not exhibit at least two of the characteristics listed in paragraph (a)(A) of this section are not suitable habitat.

(4) (For information only) Federal law prohibits a person from taking northern spotted owls. Taking under the federal law may include significant alteration of owl habitat on any class of land ownership. Compliance with subsection(1) of this rule is not in lieu of compliance with any federal requirements related to the federal Endangered Species Act.

(5) Exceptions to the requirements for protecting northern spotted owl nesting sites may be approved by the State Forester if the operator has obtained an incidental take permit from federal authorities under the federal Endangered Species Act.

APPENDIX KK

105.810 Treble damages for injury to or removal of produce, trees or shrubs; costs and attorney fees; limitation on liability of contract logger. (1) Except as provided in ORS 477.090 and subsections (4) to (7) of this section, whenever any person, without lawful authority, willfully injures or severs from the land of another any produce thereof or cuts down, girdles or otherwise injures or carries off any tree, timber or shrub on the land of another person, or of the state, county, United States or any public corporation, or on the street or highway in front of any person's house, or in any village, town or city lot, or cultivated grounds, or on the common or public grounds of any village, town or city, or on the street or highway in front thereof, in an action by such person, village, town, city, the United States, state, county, or public corporation, against the person committing such trespasses if judgment is given for the plaintiff, it shall he given for treble the amount of damages claimed, or assessed for the trespass. In any such action, upon plaintiffs proof of ownership of the premises and the commission by the defendant of any of the acts mentioned in this section, it is prima facie evidence that the acts were committed by the defendant willfully, intentionally and without plaintiffs consent.

(2) A court may, in its discretion, award to a prevailing party under subsection (1) of this section reimbursement of reasonable costs of litigation including but not limited to investigation costs and attorney fees.

(3) A court may, in its discretion, award to a prevailing plaintiff under subsection (1) of this section reasonable costs of reforestation activities related to the injury sustained by the plaintiff.

(4) A contract logger is liable only for actual damages in an action under this section if:

(a) The contract logger conducts an operation under a signed, written contract with a person the contract logger reasonably believes to be the legal owner of the produce, trees, timber or shrubs in the operation area;

(b) The contract identifies the operation area by a metes and bounds description or other sufficient legal description;

(c) Before the contract logger begins harvesting in the operation area, the person who engages the contract logger under the contract:

(A) Locates, marks and protects from damage all survey monuments in the operation area;

(B) Flags, stakes or otherwise clearly marks the boundaries of the operation area; and

(C) Provides the contract logger with a copy of the deed, contract or other instrument that the person who engages the contract logger under the contract relies upon as proof of ownership of the produce, trees, timber or shrubs in the operation area;

(d) The contract logger verifies the deed, contract or instrument described in paragraph (c)(C) of this subsection against the metes and bounds description or other sufficient legal description in the contract;

(e) The contract logger retains a copy of the deed, contract or instrument described in paragraph (c)(C) of this subsection for at least three years; and

(f) The contract logger does not receive written notice that any person has a claim of title to the land or timber in the operation area that is adverse to the person who engages the contract logger under the contract.

(5) Subsection (4) of this section does not affect an action for double or treble damages against a contract logger for

damages outside the operation area as described in subsection (4) of this section.

(6) If an action is brought under this section against a contract logger, and the contract logger was engaged to harvest the timber by a person who purported to own the timber or to have authority to harvest the timber, the person who engaged the contract logger must be joined in the action as a defendant unless jurisdiction over the person cannot be had. If a judgment is entered gainst the contract logger and against the person who engaged the contract logger, the contract logger shall not be required to pay any part of the judgment unless the plaintiff establishes that the judgment cannot he enforced against the person who engaged the contract logger. The plaintiff may enforce the judgment against the contract logger only if:

(a) The plaintiff makes a good faith effort for at least six months after the judgment becomes final and subject to exe-
cution to enforce the judgment against the person who en-
gaged the contract logger; and

(b) The court determines, upon motion of the plaintiff, that all or part of the judgment cannot be collected from the person who engaged the contract logger.

(7) Subsections (2) and (3) of this section apply in an action against a contract logger under subsection (4) of this section.

(8) For purposes of this section:

(a) "Contract logger" means a person engaged in a commercial timber harvesting operation.

(b) "Operation" has the meaning given in ORS 527.620 (12). [Amended by 1995 c.721 $1; 1999 c.544 $1]

APPENDIX LL

16 U.S.C.A. § 1539 (West 2000)

(1) The Secretary may permit, under such terms and conditions as shall prescribe—

* * *

(B) any taking otherwise prohibited by section 1538(a)(1)(B) of this title if such taking is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity.

(2)(A) No permit may be issued by the Secretary authorizing any taking referred to in paragraph (1)(B) unless the applicant therefor submits to the Secretary a conservation plan that specifies—

(i) the impact which will likely result from such taking;

(ii) what steps the applicant will take to minimize and mitigate such impacts, and the funding that will be available to implement such steps;

(iii) what alternative actions to such taking the applicant considered and the reasons why such alternatives are not being utilized; and

(iv) such other measures that the Secretary may require as being necessary or appropriate for purposes of the plan.

(B) If the secretary finds, after opportunity for public comment, with respect to a permit application and the related conservation plan that—

(i) the taking will be incidental;

(ii) the applicant will, to the maximum extent practicable, minimize and mitigate the impacts of such taking;

(iii) the applicant will ensure that adequate funding for the plan will be provided;

(iv) the taking will not appreciably reduce the likelihood of the survival and recovery of the species in the wild; and

(v) the measures, if any, required under subparagraph (A)(iv) will be met;

and he has received such other assurances as he may require that the plan will be implemented, the Secretary shall issue the permit. The permit shall contain such terms and conditions as the Secretary deems necessary or appropriate to carry out the purposes of this paragraph, including but not limited to, such reporting requirements as the Secretary deems necessary for determining whether such terms and conditions are being complied with.

Supreme Court, U.S.
FILED
AUG 20 2004
OFFICE OF THE CLERK

(2)

No. 04-100

In the

Supreme Court of the United States

MARSHA SEIBER and ALVIN SEIBER

Petitioners,

v.

UNITED STATES

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

JAMES S. BURLING
Counsel of Record
Pacific Legal Foundation
3900 Lennane Drive, Suite 200
Sacramento, California 95834
Telephone: (916) 419-7111
Facsimile: (916) 419-7747

Counsel for Amicus Curiae
Pacific Legal Foundation

QUESTIONS PRESENTED

(1) Is the Takings Clause violated when the government commandeers the use of 40 acres of trees to provide habitat for a spotted owl?

(2) Does it matter that the owners did not lose the ability to use the trees on other property they owned?

(3) Should this taking be analyzed as a physical invasion or a regulatory taking?

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INTEREST OF AMICUS CURIAE

Pacific Legal Foundation is a nonprofit public interest legal foundation that specializes in defending property rights and other individual liberties.[1] Pacific Legal Foundation attorneys have represented property owners before this Court when regulatory agencies have taken rights in property without the payment of just compensation, *see, e.g.*, *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001), *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725 (1997), *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), and Pacific Legal Foundation has participated as amicus curiae in almost all of the major Takings Clause cases before this Court in the past 30 years.

This amicus brief will urge this Court to grant review in order to resolve the conflict over the degree to which government may take discrete interests in private property and avoid the duty to pay just compensation because the owner retains other discrete interests. This case can also resolve the important question of whether government programs that protect animal habitat should be judged by a standard applicable to physical invasions or regulatory takings. Amicus Pacific Legal Foundation believes that it can add insight as to why this case presents an excellent vehicle for resolving these issues.

Counsel for petitioner and respondent have consented to the filing of this brief. Letters of consent are filed with the Clerk of this Court.

INTRODUCTION AND SUMMARY

Once again landowners come to this Court seeking clarification in matters of Takings Clause jurisprudence that

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[1] Pursuant to Rule 37.6, Amicus Curiae affirms that no counsel for any party authored this brief in whole or in part and that no person or entity made a monetary contribution specifically for the preparation or submission of this brief.

continue to bedevil the state and lower federal courts, a state of conflict that leaves landowners and regulators alike without clear direction. The facts of this case are simple: by denying a landowner an Incidental Take Permit, the government denied a landowner the assurance that he would not be prosecuted for violating the Endangered Species Act if he cut trees near a spotted owl nest. In essence, the government commandeered 40 acres of trees for the public purpose of preserving spotted owl habitat. While the facts are obvious enough, the law affecting this case is anything but simple.

What, if anything, has been taken? The law is not settled over whether the object of the takings analysis should be: (1) just the trees on these 40 acres (2) the trees plus the underlying ground on these 40 acres, or (3) trees and the underlying ground on these 40 acres *plus* another 160 acres owned by the Seibers but not expropriated by the government for habitat preservation.

By what standard should this taking be judged? Is the government-sanctioned imposition of protected owl habitat on these 40 acres equivalent in nature to other physical invasions, such as those where other nongovernmental entities or objects are permitted to occupy private property? The state and lower federal courts have not determined whether there is a distinction between those cases where a landowner must refrain from using property (as in a zoning or typical permit denial case) and those cases where the property is actually being utilized for a direct governmental purpose (as with a lake behind a dam or a nest for a protected species of animal.)

The remainder of this brief will explain why this Court should accept the Petition for Writ of Certiorari to answer these questions.

ARGUMENT

I

THERE IS NO CONSENSUS IN THE STATE AND LOWER FEDERAL COURTS AS TO HOW THE RELEVANT PARCEL SHOULD BE DEFINED

A key question here is what is the relevant parcel or object of the takings inquiry? There are three choices: (1) the specific interest in property used by the government (the trees on 40 acres of land) to preserve owl habitat, (2) all the property used by the government (40 acres of trees plus the underlying ground), or (3) all the property used by the government plus all other contiguous property owned by the same owner (200 acres of trees plus the underlying ground). There is no consensus of opinion in the state and lower federal courts on this question.

Suppose that the government came upon 40 acres of the Seibers' property and cut and removed all the trees and sold them for profit. There is no question that the government would be liable to the Seibers for the tort of conversion. *Restatement (Second) Torts* § 223. The government's liability in such a case dates back at least to the Magna Carta. "No constable or other bailiff of ours [the King] shall take the corn, or other chattels of any one except he straightway give money for them."[2] There is also no question that the government would be liable regardless of how much other timber the Seibers might own elsewhere.

Suppose instead that the government came onto 40 acres of the Seibers' property, cut the trees, but left them on the ground for chipmunk habitat and prohibited the Seibers from

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[2] Ernest F. Henderson, *Select Historical Documents of the Middle Ages* (Stubb's Charters trans.), *in The Constitution of the United States of America and the Constitution of the State of California* 6 (California State Senate 1993-1994).

moving the trees, making the underlying land useless for all purposes. Again, there should be no question that there is liability. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015 (1992) (describing classes of categorical takings). The government would still be liable for the conversion of the trees. *Restatement (Second) Torts* §§ 223, 226. But it also would be liable for the taking of the underlying property. Again, the government's liability for the conversion is independent of how much other timber the Seibers might own elsewhere. But, as will be shown, there is wide disagreement on whether the taking of the underlying property is somehow ameliorated if the Seibers own other timberland that is not burdened by the government action.

Finally, suppose that the government came on the same 40 acres and marked all the trees as protected property not to be touched so that they can be used only for owl habitat. Because of the prevalence of trees on the property, the underlying ground cannot be used. In this case, it is doubtful that the tort of conversion would apply because the government has not altered or destroyed the trees. But there is a strong argument that the trees and the underlying land have been taken. (The theory under which there has been a taking will be discussed in Part II, *infra*.) What is especially not clear, however, is to what extent the Seibers' ownership of other timber and other land should affect the finding of a taking of the Seibers' trees and land. To the Seibers, of course, the results in all three scenarios are nearly the same. They cannot use their trees in any of the scenarios and they cannot use their land in the latter two. Yet, in the last scenario, where they have been injured *more* than in the first scenario (losing the use of both the trees and the land), they may be the least likely in some courts to receive compensation simply because they own other property not affected by the regulations.

The state of affairs where the more one owns the more government can take, without paying just compensation, has

troubled this Court and has confused the state and lower federal courts. In *Palazzolo v. Rhode Island*, 533 U.S. 606, this Court wrote: "Some of our cases indicate that the extent of deprivation effected by a regulatory action is measured against the value of the parcel as a whole, . . . but we have at times expressed discomfort with the logic of this rule . . . a sentiment echoed by some commentators." *Id.* at 631. Because the issue of the relevant parcel had not been previously raised in *Palazzolo*, this Court did not contemplate it further. The present case, however, provides a good opportunity for this Court to revisit the question of the relevant parcel. And, considering the degree to which confusion has reigned in the state and lower federal courts, it is an issue worthy today of this Court's consideration.

There are two aspects of the relevant parcel question at issue in this case. First, there is the matter of whether the trees can be treated separately from the surface estate for purposes of a takings analysis. Second, because the Seibers own timberland outside the affected 40 acre spotted owl nest site, was it appropriate for the court to suggest that the entire 200 acres they owned should be considered to be the relevant parcel? Petitioners focus on the first of these questions, arguing that the affected trees should be the focus of the takings inquiry. The Federal Circuit below, however, felt that it did not need to determine whether the trees should be treated as a separate estate, because "[t]he Seibers have never alleged that their timber on the entire two hundred-acre parcel was rendered valueless." Opinion, Pet. App. at 22a. Thus, the Seibers focused on just the trees, the court focused on everything the Seibers owned in the vicinity, and neither the Seibers nor the court below chose to focus on the 40 acres of trees plus the 40 acres of land on which the trees grew. The proper choice among these alternatives is not obvious because there is no uniformity in the lower courts. Had the law been more clear,

then the Seibers and the court would have been able to determine more easily the appropriate denominator.

A. Some State and Federal Courts Focus on the Property Affected by a Prohibitory Regulation

In *Florida Rock Industries, Inc. v. United States*, 791 F.2d 893 (Fed. Cir. 1986), *cert. denied*, 479 U.S. 1053 (1987) (*Florida Rock I*), the Federal Circuit Court of Appeals was confronted by a single 1,560-acre parcel subject to the Corps of Engineers' restrictions. The landowner argued that all 1,560 acres of its wetland mining property had been taken after a permit to mine 98 acres was denied. 791 F.2d at 895-96, 904-05. The government argued that there was ***no*** taking because the use of only 98 acres had been denied—leaving the "parcel as a whole" largely unaffected by the denial. *Id.* at 904. The Federal Circuit rejected both arguments, holding that (1) it would be unfair to the government to award compensation for the 1,462 acres for which the applicant had no immediate plans, *id.* at 904-05, and (2) the court would focus on only the 98 acres to see if there had been a taking. *Id.* at 904.

Several years after *Florida Rock I*, the Federal Circuit responded to the government's new argument that the takings denominator should include more than the mineral rights and surface resources needed for mining. The court disagreed:

> By taking some portion of Florida Rock's economic use of the property—its power to disturb the overlying wetlands, and with it the common law property right to mine its subsurface minerals—the Government appears to have destroyed part of the value of Florida Rock's holdings.

Florida Rock Industries, Inc. v. United States, 18 F.3d 1560, 1572 (Fed. Cir. 1994), *cert. denied*, 513 U.S. 1109 (1995) (*Florida Rock IV*). The court noted that in appropriate circumstances a subset of the bundle of rights can be taken

through inverse condemnation. *See id.* at 1572 n.32. *See also Whitney Benefits, Inc. v. United States*, 926 F.2d 1169, 1174 (Fed. Cir.), *cert. denied*, 502 U.S. 952 (1991) (court rejected the government's suggestion that there was no taking because the coal owner could farm about half of its property. The mineral estate was a significant enough separate interest in property to be considered the denominator.).

In a case strikingly similar to the one now before this Court, in *Boise Cascade Corp. v. Board of Forestry*, 935 P.2d 411 (Or. 1997), a landowner was prohibited from logging 56 acres on a 64-acre tract because of a spotted owl nest. The Oregon Supreme Court held that the landowner could state a claim for a regulatory taking under the Oregon and United States constitutions. *Id.* at 415-16. Thus the court segregated the 56 acres of owl habitat from the remaining 8 acres of harvestable timber and considered the timber on the 56 acres to be the relevant parcel. As recently described by the Oregon Court of Appeals, while "the Oregon courts have not been exactly generous in their explanations, they at least have been consistent in their treatment of the whole parcel rule. In a nutshell, they have effectively rejected it." *Coast Range Conifers, LLC v. State of Oregon,* 189 Or. App. 531, 546 (Or. App. 2003). For the Federal Circuit to have rejected a claim very similar to those arising in *Boise Cascade* and *Coast Range Conifers* points out the doctrinal inconsistency that needs clarification from this Court.

In *State ex rel. R.T.G., Inc. v. State*, 780 N.E.2d 998 (Ohio 2002), a coal mining company sought just compensation for a taking after some of its coal reserves were declared unsuitable for mining because of their proximity to a watershed. The Ohio Supreme Court held first that the relevant parcel in vertical context was the coal deposit. The court also excluded from consideration coal outside the protected area and held that the owner suffered a categorical taking under *Lucas.*

The Ninth Circuit and New York Court of Appeals have similarly defined the relevant parcel in accordance to the property actually regulated. *See American Savings and Loan Association v. County of Marin*, 653 F.2d 364 (9th Cir. 1981) (separating out property in accordance to how it was zoned, relying on the government's regulatory segregation of property to define the relevant parcel); *accord Kaiser Development Co. v. City and County of Honolulu*, 649 F. Supp. 926, 947-48 (D. Haw. 1986), *aff'd*, 898 F.2d 112 (9th Cir. 1990) ("Most importantly, the City has treated Queen's Beach separately for zoning and planning purposes. . . . [U]nder the facts of this case, Queen's Beach is to be considered a separate parcel for the purposes of determining whether there has been a taking."); *Seawall Associates v. City of New York*, 542 N.E.2d 1059, 1067 (N.Y. 1989) ("[T]he permanent abrogation of one of those rights, without regard to its comparative value in relation to the whole, may well be sufficient to constitute a taking."); *accord Manocherian v. Lenox Hill Hospital*, 643 N.E.2d 479 (N.Y. 1994), *cert. denied*, 514 U.S. 1109 (1995) (finding the destruction of a reversionary interest to be a regulatory taking).

In all of these cases, the courts took a decidedly different approach than the one followed below. But the court below is not alone. Unfortunately, as shown next, there are a number of courts which insist on defining the relevant parcel very broadly, and in doing so they deny compensation for the taking of substantial interests in property.

B. Some Courts Focus on All the Contiguous Property an Owner May Have in Defining the Relevant Parcel

As noted above the Federal Circuit in *Whitney Benefits* focused on the mineral estate that was affected by the prohibition on mining. The Federal Circuit, however, has not been particularly consistent in its approach for analyzing the relevant parcel. In *Forest Properties, Inc. v. United States*, 177

F.3d 1360, 1365 (Fed. Cir. 1999), the Federal Circuit joined together a regulated wetland portion of the owner's development with an unregulated upland parcel for purposes of a takings analysis. And, of course, in the present case it rejected the Seibers' claim because it preferred to focus not just on the 40 acres where the owl-based prohibition lay, but on all of the Seibers' 200 acres.

Similarly, in *Rith Energy v. United States*, 270 F.3d 1347 (Fed. Cir. 2001), the Federal Circuit defined the relevant parcel to be all coal, both that which could not be mined after the government prohibited further mining and the coal that had already been mined.

The Tenth Circuit in *Clajon Production Corp. v. Petera*, 70 F.3d 1566 (10th Cir. 1995), expressly rejected the *Florida Rock IV* holding. *Clajon* involved an attempt to bring a takings challenge to hunting regulations in Wyoming that limited wild game licenses sold to hunters from out-of-state. The plaintiff, who derived income from out-of-state hunters, complained that this was a taking of a property right in hunting. 70 F.3d at 1577. In ruling against the rancher, the Tenth Circuit expressly rejected the Federal Circuit's language in *Florida Rock IV* that it can be appropriate to focus on the property interest actually taken:

> However, we believe that the relevant denominator must be derived from the entire bundle of rights associated with the parcel of land. . . . Thus, we reject the *Florida Rock* approach.

Id. (citations omitted).

Finally, the Pennsylvania Supreme Court, in a decision inconsistent with the Ohio Supreme Court's holding in *RTG*, ruled in *Machipongo Land & Coal Co. v. Dep't of Envtl. Protection*, 799 A.2d 751 (Pa. 2002), that the relevant parcel in

a takings analysis could consist of other coal reserves located outside of the protected watershed.

C. Contrary to Guidance from This Court, Some Courts Have Even Combined Discrete Parcels in Analyzing the Relevant Parcel

In *Lucas*, this Court expressly rejected as "extreme" and "unsupportable" the notion advocated by the New York Court of Appeal in *Penn Central Transportation Co. v. City of New York*, 366 N.E.2d 1271, 1276-77 (N.Y. 1977),

> where the state court examined the diminution in a particular parcel's value . . . in light of total value of the takings claimant's other holdings in the vicinity.

Lucas, 505 U.S. at 1016 n.7. There is a logical incongruity in the notion that owners of lots of property should be treated worse than owners of only a small amount of property. Nevertheless, some courts have found that the ownership of other interests in property potentially diminishes the impact on a regulated interest in property.

The Michigan Supreme Court in *K & K Construction, Inc. v. Department of Natural Resources*, 575 N.W.2d 531 (Mich.), *cert. denied*, 525 U.S. 819 (1998), combined a 55-acre parcel with two other parcels of 16 and 3.4 acres for purposes of determining whether there was a taking. The court reasoned that the parcels were owned in whole or in part by the same owner of the 55-acre parcel and that there was a unified plan of development. The same reasoning was followed in *Volkema v. Department of Natural Resources*, 542 N.W.2d 282 (Mich. Ct. App. 1995), *cert. denied*, 525 U.S. 1040 (1998).

The Michigan example was also followed in *Karam v. New Jersey Department of Environmental Protection*, 705 A.2d 1221 (N.J. Super. Ct. App. Div. 1998), *aff'd by adopting appellate opinion*, 723 A.2d 943 (N.J.), *cert. denied*, 528 U.S. 814 (1999). In *Karam*, the appellate court examined the history

of a lot comprised of an upland and wetland unit and found the two portions to be a single unit for a takings analysis.

These cases all follow the logic of the notion that this court rejected in *Lucas*: The more real property one owns, the more the government can take without having to pay for it. Professor Eagle has criticized this approach, calling it "conceptual agglomeration" in opposition to the idea of "conceptual severance" that this Court rejected in *Tahoe-Sierra.* Steven J. Eagle, *Regulatory Takings* § 11-7(b)(2) (2d ed. 2001). *See also* John E. Fee, *Of Parcels and Property,, in Takings Sides on Takings Issues: Public and Private Perspectives* (Thomas Roberts, ed. 2002), § 5.1 at 103 (discussing principle of conceptual agglomeration).

There is no uniformity to how courts decide how much of an owner's property to consider when deciding how much value has been destroyed by government regulation. Only this Court can provide some measure of consistency and guidance.[3]

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[3] Moreover, the nature of this taking—as a physical invasion by the owls of the trees of the Seiber's property—makes the focus on the discrete interests in the property taken all the more compelling. As this Court explained in *Brown v. Legal Foundation of Washington*, 538 U.S. 216 (2003), physical invasion takings can occur even if other property is unaffected and even if the taking is temporary:

> When the government physically takes possession of an interest in property for some public purpose, it has a categorical duty to compensate the former owner . . . regardless of whether the interest that is taken constitutes an entire parcel or merely a part thereof. Thus, compensation is mandated when a leasehold is taken and

(continued...)

II

THE COURT CAN RESOLVE THE QUESTION OF WHETHER A TAKING IN WHICH GOVERNMENT COMMANDEERS PROPERTY FOR USE BY OWLS IS A PHYSICAL INVASION

The Seibers assert that the government's commandeering of their property in order to provide a nesting site for a pair of spotted owls is the physical invasion of their property.

The scenarios described at the beginning of this brief's argument demonstrate the transition from an absolute conversion of property, compensable under theories of tort, to government action that is not compensable in tort but nonetheless has an equally devastating impact on the use and value of the property. It was to provide fairness and justice in this circumstance that this Court first articulated the concept of a physical invasion taking in *Pumpelly v. Green Bay & Mississippi Canal Company*, 80 U.S. 166 (1871). There, this Court noted

> if the government refrains from the absolute conversion of real property to the uses of the public it can destroy its value entirely, can inflict irreparable and permanent injury to any extent, can, in effect, subject it to total destruction without making any compensation, because, in the narrowest sense of that word, it is not taken for the public use. Such a construction would pervert the constitutional provision into a restriction upon the rights of the citizen, as those rights stood at the common law,

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[3] (...continued)
the government occupies the property for its own purposes, even though that use is temporary.

Id. at 233.

> instead of the government, and make it an authority for invasion of private right under the pretext of the public good, which had no warrant in the laws or practices of our ancestors.

Id. at 177-78.

To be sure, the physical invasion in *Pumpelly's* reservoir was more tangible than forest land commandeered to play host to a pair of nesting spotted owls. So too, is the concept of "public use" which has come to mean not an actual occupation by members of the public as with a road, post office, or public works project, but more of a project that promotes the a legislatively determined "public purpose." *See, e.g., Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 240 (1984) (The "public use requirement is thus coterminous with the scope of a sovereign's police powers.") This evolving view of "public use" is consistent with the view that taking can occur when private property is commandeered to serve a larger public good–even when there is no direct appropriation. As this Court continued in *Pumpelly*, "there are numerous authorities to sustain the doctrine that a serious interruption to the common and necessary use of property may be . . . equivalent to the taking of it, and that under the constitutional provisions it is not necessary that the land should be absolutely taken." 80 U.S. at 181.

A. The Issue and the Lower Court's Ruling

In *Yee v. City of Escondido*, 503 U.S. 519 (1992), this Court explained that government effects a physical taking whenever "it requires the landowner to submit to the physical occupation of his land." 503 U.S. at 527. To rephrase the point, a physical taking occurs whenever the government deprives a property owner of his "right to exclude," a right that is "one of the most essential sticks in the bundle of rights that are commonly characterized as property." *Id.* at 528 (quoting *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979)). In

either formulation, it is the "element of required acquiescence [that] is at the heart of the concept of occupation." *Id.* at 527 (quoting *FCC v. Florida Power Corp.*, 480 U.S. 245, 252 (1987)). Indeed, this Court recently noted the obvious point that this required acquiescence is often effected by means of regulation: where "regulations . . . require the [property owner] to suffer the physical occupation of a portion of his building," they will be analyzed not as regulatory takings but rather as physical takings. *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*, 535 U.S. 302 323 n.18 (2002) (quoting *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 440 (1982)).

In the present case, the Seibers alleged in their inverse condemnation complaint that the effect of the government's regulations was to "impose[] a servitude upon their property requiring the merchantable timber to be left standing so it can occupied as a northern spotted owl nesting site." Pet. App. at 57a, ¶ 9. In brief, the Seibers alleged that the government required them to submit to the physical occupation of their land by spotted owls. Or, to frame the allegation in other pertinent terms, the government deprived the Seibers of the right to exclude the owls from their property and instead required them to acquiesce in the owls' presence on their land. In so alleging, the Seibers successfully stated a claim for a categorical taking by physical occupation under this Court's precedents.

Without in any manner questioning the accuracy of the Seibers' allegations concerning the effect of the government's actions, the Federal Circuit rejected the Seibers' physical occupation claim, saying only that "regulatory restrictions on the use of property do not constitute physical takings." Opinion, Pet. App. at 16a. The court based this assertion on a citation to *Tahoe-Sierra*. Pet. App. at 16a (citing *Tahoe-Sierra*, 535 U.S. at 303). This Court in *Tahoe-Sierra*, however, was noting only that "[t]he longstanding distinction between physical and regulatory takings makes it inappropriate to treat precedent

from one as controlling on the other." 535 U.S. at 303. It was *not* providing any guidance on whether a regulation of this sort—where a landowner must involuntarily acquiesce to an occupation of his property—is a physical or regulatory taking.

The court below also relied on one of its own precedents, *Boise Cascade v. United States*, 296 F.3d 1339 (Fed. Cir. 2002) for the proposition that "the government protection of owls . . . is not comparable to a government authorization to third parties to utilize property." Specifically, the court in *Boise Cascade* held that

> between a government authorizing or conducting a physical invasion of the property of another and a government regulating what one may do with property due to the random or incidental location of a natural resource or wild animal on the property. The state has no control over where spotted owls choose to nest.

296 F.3d at 1354. But, this assertion is inconsistent with prior decisions of this Court.

B. The Conflict with This Court

In *Kaiser Aetna*, the property owners converted a privately owned lagoon into a marina, thereby connecting the lagoon to a publicly owned bay; subsequently, the United States sought "an injunction to require [the owners] to allow public access" to the waters of the marina on the ground that it had become subject to the federal "navigational servitude." 444 U.S. at 169. Having ruled that "Congress could assure the public a free right of access to the [waters of the marina] if it so chose," *id* at 174, this Court went on to consider whether Congress could do so "without invoking its eminent domain power and paying just compensation," *id*. at 180. The Court emphatically ruled that Congress could not, because "the imposition of the navigational servitude in this context will result in an *actual physical*

invasion of the privately owned marina." *Id.* (emphasis added). Here, as in the present case, the government has "no control" of where or when boaters [or owls] may decide to utilize the property. The key is not that the government was protecting the waterway, but that it forced the landowner to acquiesce in the use of that waterway by others.

Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, is similar. In that case, "New York law provide[d] that a landlord must permit a cable television company to install its cable facilities upon his property." *Id.* at 421. This Court concluded that "such a physical occupation of property is a taking." *Id.* As in the present case, this case involved more than the mere regulation of apartment rooftops and cable. Instead, the Court characterized the case as one in which the government's regulations "require[d] the landlord to suffer the physical occupation of a portion of his building by a third party." *Id.* at 440 (emphasis added); *accord Florida Power Corp.*, 480 U.S. at 252 (quoting same); *Tahoe-Sierra*, 535 U.S. at 323, n.18 (quoting same). Also relevant to the present case, it is crucial to recognize that the New York City government did not "cause or induce" the cable company to occupy the property of the landlord and has "no control" over that activity.

In *Nollan v. California Coastal Commission*, 483 U.S. 831, this Court held that had the government "required the [property owners] to make an easement across their beachfront available to the public on a permanent basis . . ., we have no doubt there would have been a taking." The Court reached this conclusion even though that property would have been periodically occupied not by the government, but by random members of the beachgoing public:

> In Loretto we observed that where governmental action results in "a permanent physical occupation" of the property, by the government itself or by others, "our cases uniformly have found a taking to

> the extent of the occupation, without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner."

Id. at 831-32 (emphasis added and citations omitted) (quoting *Loretto*, 458 U.S. at 432-35). *Nollan* therefore confirms that physical occupations may be effected "by the government itself or by others." This again is not a case merely where the government is regulating so that a landowner must refrain from use–but both *Nollan* and the present case the government would require the owner to allow the property to be put to a public use; by trespassers or by owls—in a way that substantially interferes with the owner's use and enjoyment of the property.

Finally, in *Brown v. Legal Foundation of Washington,* 538 U.S. 216, this Court found a physical invasion when funds belonging to legal clients was involuntarily transferred to the Legal Foundation of Washington. This Court noted that "the transfer of the interest to the Foundation here seems more akin to the occupation of a small amount of rooftop space in Loretto." *Id.* at 235. Here, the occupation of the treetops has the same result and should be treated as a physical invasion.

C. The Conflict with Other Lower Courts

The decision in *Seiber* also conflicts with decision of the Eleventh and D.C. Circuit Courts of Appeals. In *Gulf Power Co. v. United States*, 187 F.3d 1324 (11th Cir. 1999), the Eleventh Circuit concluded that the Pole Attachment Act[4] "effects a [physical] taking of a utility's property." *Id.* at 1328. (citation omitted). The explicit nature of the conflict is clear when it is recalled that the court below held that requiring property owners to acquiesce in the presence of the owls did not

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[4] 47 U.S.C. § 224(f)(1) (provides that a public utility company must provide access to a cable television or telecommunications carriers with nondiscriminatory access to poles, conduits, or right-of-ways.)

effect a physical occupation because the government was simply protecting the owls, or in the words of the case it cited for authority, merely "regulating what one may do with property," *Boise Cascade,* 296 F.3d at 1354. The Eleventh Circuit confronted a similar argument—"the mandatory access provision [is] a *simple regulatory condition*"—and quickly rejected it as "meritless." *Gulf Power Co.*, 187 F.3d at 1330 (emphasis added). "Characterizing the mandatory access provision as a regulatory condition," concluded the court, "cannot change the fact that it effects a taking by requiring a utility to submit to a permanent, physical occupation of its property." *Id.* at 1331.

More generally, the "power to regulate [property] does not extend to taking without just compensation the right of a [property owner] to exclude unwanted occupiers of its property." *Id.* As the Eleventh Circuit observed, among other arguments this Court rejected in *Loretto* "was the argument that the statute was merely a 'permissible regulation of the use of real property.' . . . [A]lthough property is subject to broad regulatory power, a regulation becomes a taking when the government authorizes permanent, physical occupation by a third party." *Id.* at 1328 (quoting *Loretto*, 458 U.S. at 439-40).

Similarly, in *Bell Atlantic Telephone Cos. v. FCC*, 24 F.3d 1441, 1443 (D.C. Cir. 1994), the D.C. Circuit addressed a "physical co-location" access scheme under which local telephone exchange companies are required to "set aside a portion of their central offices for occupation and use by competitive access providers." *Id.* at 1443. The D.C. Circuit concluded that the scheme "directly implicates the Just Compensation Clause of the Fifth Amendment, under which a 'permanent physical occupation authorized by government is a taking without regard to the public interests that it may serve.'" *Id.* at 1445 (quoting *Loretto*, 458 U.S. at 426).

Like the Eleventh Circuit's decision in *Gulf Power*, the D.C. Circuit's decision in *Bell Atlantic* cannot be squared with *Seiber*.

CONCLUSION

The petition for writ of certiorari should be granted.

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Respectfully submitted,

JAMES S. BURLING
Counsel of Record
Pacific Legal Foundation
3900 Lennane Drive, Suite 200
Sacramento, California 95834
Telephone: (916) 419-7111
Facsimile: (916) 419-7747

Counsel for Amicus Curiae
Pacific Legal Foundation